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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ANGELO MORALES,)	Case No. C 06 0219 (MCC)
)	
Plaintiff,)	PLAINTIFF'S MOTION FOR
)	TEMPORARY RESTRAINING
)	ORDER; MEMORANDUM OF
)	POINTS AND AUTHORITIES IN
)	SUPPORT THEREOF
)	
v.)	
)	
RODERICK Q. HICKMAN, Secretary of the)	Date: January 26, 2006
California Department of Corrections; STEVEN)	Time: 9am
ORNOSKI, Warden, San Quentin State Prison,)	Courtroom: 7
San Quentin, CA; and DOES 1-50,)	
)	
Defendants.)	
)	

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NOTICE OF APPLICATION AND APPLICATION

Plaintiff Michael Morales is currently under a sentence of death. On January 6, 2006, the clerk of the Superior Court of Ventura County issued a Notice of Public Session in the case of *People v. Morales*, No. CR 17960, scheduling a public session on January 18, 2006 for the purpose of the setting of the date of execution of judgment of death of February 21, 2006. On January 12, 2006, the Superior Court of Ventura County entered an Order continuing the Notice of Public Session to January 31, 2006. Mr. Morales seeks preliminary injunctive relief to prevent defendants Steven Ornoski, Warden of San Quentin Prison, and Roderick Hickman, Secretary of the California Department of Corrections ("CDC"), from executing Mr. Morales by means of lethal injection pending the resolution of this action. Mr. Morales alleges that the Department of Correction's lethal injection protocol, as described in Procedure No. 770, which is attached hereto as Exhibit A, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment because it creates a substantial risk that Mr. Morales will be fully conscious and in agonizing pain for the duration of the execution process.

This application for a temporary restraining order is made pursuant to Federal Rule of Civil Procedure 65 and Civil Local Rule 65-1. Mr. Morales will sustain irreparable harm if injunctive relief is not granted preventing the defendants from conducting Mr. Morales's execution in accordance with Procedure No. 770. Mr. Morales is likely to prevail on the merits of the underlying action and the balance of hardships weighs decidedly in his favor. This application is based on the verified complaint, the following memorandum of points and authorities, and exhibits including the declaration of Dr. Mark Heath.

Pursuant to Fed. R. Civ. P. 65(b), the complaint has been provided to opposing counsel. Mr. Morales requests that the Court issue an order to show cause and determine a briefing schedule so that the hearing on this matter occurs no later than January 26, 2006, or as soon thereafter as the Court may set given the need for expedited resolution of this matter.

I. INTRODUCTION

Under California law, Michael Morales, a death row inmate at San Quentin State Prison, will be executed by lethal injection. A growing body of evidence, including medical evidence, eyewitness observations, and veterinary studies, persuasively demonstrates that CDC's lethal injection protocol creates a significant risk that inmates will fail to receive adequate anesthesia and will be conscious for the duration of their executions. Without anesthesia, the inmate would experience first slow suffocation and then the "extraordinarily painful" activation of the sensory nerve fibers in the walls of the veins that is caused by potassium chloride. *See* Declaration of Dr. Mark Heath ¶ 11, attached hereto as Exhibit C. Given this significant danger under the current protocol, Mr. Morales seeks to prevent the defendants from executing him in a manner that is likely to subject him to this excruciating pain.

Procedure No. 770 calls for the use of three drugs in succession: first, sodium pentothal, an ultrashort-acting barbiturate that under ideal conditions will cause the inmate to lose consciousness; pancuronium bromide, a neuromuscular blocking agent that paralyzes the muscles and has no apparent purpose other than to make the execution appear peaceful to witnesses; and finally, potassium chloride, which induces cardiac arrest. Procedure No. 770 also establishes the conditions under which these drugs are administered. These conditions – including the remote administration of the drugs, the absence of trained personnel, and a failure to monitor the inmate's condition – create a serious risk that the drugs, particularly the sodium pentothal, will not be properly administered. Such an error could result, and has resulted, in inmates retaining consciousness during portions of their executions. Yet Procedure No. 770 also fails to set forth any procedures for preventing or reacting to these obvious risks: It does not, for instance, explain how execution personnel should detect and react to problems with drug administration or provide for stopping the execution should it become clear that the inmate is conscious.

Thus, Mr. Morales's suit is not premised on the possibility that some unforeseen error or unavoidable accident might cause him to be aware and in excruciating pain during his execution.

1 On the contrary, he alleges that the significant risk of botched executions is an entirely
2 foreseeable consequence of the conditions imposed by, and failings of, Procedure No. 770. It is
3 surely unconstitutional for the State to institute an execution protocol that creates a significant
4 risk of inflicting excruciating pain, and then to consciously disregard that risk. Mr. Morales
5 therefore requests that the Court enjoin the defendants from executing him by means of lethal
6 injection as it is currently administered under Procedure No. 770.

7 **II. FACTUAL BACKGROUND**

8 In 1983, Michael Morales was convicted in Ventura County court of murdering Traci
9 Winchell. The jury found that two special circumstances – killing by torture and intentional
10 killing by lying in wait – applied to the offense. Cal. Penal Code § 190.2(a)(15), (18).
11 Following the penalty phase, the jury sentenced Mr. Morales to death. *See People v. Morales*,
12 770 P.2d 244 (Cal 1989). The California Supreme Court affirmed the conviction and sentence
13 in 1989, *id.* at 249, and the United States Supreme Court denied certiorari.

14 Mr. Morales filed a petition for habeas corpus in federal court in 1996, raising several
15 constitutional challenges to his conviction and sentence. The district court denied the petition in
16 full, and the Ninth Circuit affirmed in July 2003. *See Morales v. Woodford*, 336 F.3d 1136, 1153
17 (9th Cir. 2003). The Supreme Court denied certiorari on October 11, 2005, and the stay of
18 execution was lifted shortly thereafter. Mr. Morales will not elect a form of execution, and
19 therefore will be executed by means of lethal injection. *See* Cal. Penal Code § 3604(b)
20 (providing that lethal injection is the presumptive means of execution). On January 6, 2006, the
21 clerk of the Superior Court of Ventura County issued a Notice of Public Session in *People v.*
22 *Morales*, No. CR 17960, setting a hearing on January 18, 2006 for the purpose of the setting the
23 date of execution of judgment of death of February 21, 2006. On January 12, 2006, the Superior
24 Court of Ventura County continued the Notice of Public Session to January 31, 2006.

25 On January 9, 2006, plaintiff filed an inmate appeal on CDC Form 602 alleging that his
26 execution under the lethal injection protocol of the California Department of Corrections would
27 constitute cruel and unusual punishment. A copy of the Form 602 is attached to the Verified
28

1 Complaint filed contemporaneously. Plaintiff asked that his appeal be processed as an
2 emergency appeal pursuant to 15 Cal. Code Regs. §3084.7 because the State of California
3 shortly intended to seek his execution date. Plaintiff's claim has not yet been ruled upon.

4 Notwithstanding his filing of an appeal on CDC Form 602, Plaintiff is not required to
5 exhaust administrative remedies before bringing this claim because resolution of the grievance
6 seeking modification of Procedure No. 770 is not possible through the appeal process and
7 exhaustion is futile.

8 On November 24, 2004, Donald J. Beardslee, San Quentin Inmate No. C-82702, raised a
9 challenge similar to plaintiff's claim here when he filed two inmate appeals on CDC Form 602
10 alleging that the Department of Correction's lethal injection procedure violated his rights under
11 the First and Eighth Amendments to the United States Constitution. After being considered on
12 an emergency basis, the appeals were first denied by the Warden and then denied by the Director
13 of the Department of Corrections on Third Level Review. In denying Beardslee's appeal, the
14 Director's Level Appeal Decision stated that Beardslee's "sentence and penalty were established
15 by court in California; therefore relief at the Director's Level of Review cannot be afforded the
16 appellant." Administrative review therefore cannot resolve the issues raised in plaintiff's appeal.

17 Moreover, pursuit of administrative review is futile for additional reasons. In subsequent
18 proceedings in Beardslee's case, the Court of Appeals for the Ninth Circuit observed that "by
19 regulation the California Department of Corrections does not permit challenges to anticipated
20 action[s]. 15 Cal. Code Regs. § 3084.3(c)(3)." *Beardslee v. Woodford*, 395 F.3d 1064, 1069
21 (9th Cir. 2005). No administrative challenge to the lethal injection protocol is possible here.

22 **III. ARGUMENT**

23 In moving for a temporary restraining order against defendants, Mr. Morales seeks only
24 to preserve the status quo while he litigates his Eighth Amendment claim. Mr. Morales is likely
25 to succeed on the merits, and will suffer irreparable harm in the absence of temporary relief. It is
26 also in the public interest to grant temporary relief because doing so will allow the important
27 question of the constitutionality of Procedure No. 770 to be resolved on the merits.

A. THE LEGAL STANDARD

In order to obtain a temporary restraining order or preliminary injunction, Plaintiff must demonstrate “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995). As the Ninth Circuit has explained, the necessary showing of likelihood of success diminishes in proportion to the “relative hardship to the party seeking the preliminary injunction,” *Beardslee v. Woodford*, 395 F.3d 1064, 1067-68 (9th Cir. 2005); thus, where the balance of hardships tips sharply in favor of the plaintiff, he need only demonstrate the existence of serious questions going to the merits, *see id.*

B. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

1. Plaintiff’s Claim Is Cognizable Under Section 1983

Mr. Morales does not challenge the legality of his conviction or sentence, nor does he seek to prevent the State from executing him in a lawful manner. Mr. Morales’s challenge therefore is a “method of execution” claim that is cognizable under 42 U.S.C. § 1983. *See id.* at 1068-69 (holding that because Beardslee challenged “California’s lethal injection protocol, rather than the punishment of lethal injection *per se*,” his claim was cognizable under § 1983 rather than habeas corpus); *see also Nelson v. Campbell*, 541 U.S. 637, 647 (2004) (focusing on whether the petitioner’s challenge “would *necessarily* prevent” the State from carrying out the execution (emphasis in original)).

2. California’s Lethal Injection Protocol Violates the Eighth Amendment

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishments. U.S. Const. amend. VIII. The prohibition includes the “infliction of unnecessary pain in the execution of the death sentence.” *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *see also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits the “unnecessary and wanton infliction of pain”). Whether a method of execution inflicts “unnecessary” pain is

1 inherently a relativistic inquiry. Thus, whether pain is “unnecessary” must be determined
2 according to “evolving standards of decency,” and “contemporary values concerning the
3 infliction of a challenged sanction.” *Gregg*, 428 U.S. at 173. A method of execution that was
4 touted as more humane than available alternatives when it was first introduced therefore could,
5 over time, come to offend contemporary values because, for example, experience with the
6 method in question has demonstrated that it is not in fact as humane as first thought. *See Fierro*
7 *v. Gomez*, 77 F.3d 301, 303 n.1 (9th Cir. 1996) (noting, in a challenge to the constitutionality of
8 execution by lethal gas, that the California Supreme Court had last considered such a challenge
9 in 1953, and that the court’s consideration had been limited by then-existing scientific
10 knowledge), vacated as moot in light of Cal. Penal Code § 3604, 519 U.S. 918.

11 In determining whether a particular method of execution offends contemporary standards
12 of decency by inflicting unnecessary pain, the Ninth Circuit examines the “objective evidence of
13 the pain involved in the challenged method.” *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir.
14 1994). Such evidence can include the execution records of inmates executed using the same
15 method; expert testimony regarding the effect of the method on both humans and animals; and
16 scientific studies and other evidence analyzing the effects on humans and animals. *See Fierro*,
17 77 F.3d at 307 (listing the types of evidence considered by the district court in analyzing the
18 effects of exposure to cyanide gas); *Campbell*, 18 F.3d at 683-87 (discussing expert testimony,
19 scientific literature, and experiments on death by hanging considered by the district court).
20 Moreover, the Ninth Circuit has established that evidence of an inmate’s voluntary and
21 involuntary movement, expression, and apparent consciousness during his execution, as
22 observed by witnesses to the execution, can be probative of whether the inmate is suffering
23 unnecessary pain. *See Fierro*, 77 F.3d at 307-08 (relying on eyewitness accounts of executions
24 by lethal gas); *Campbell*, 18 F.3d at 685 (relying on physician’s observations during an
25 execution by hanging to conclude that the inmate had quickly lost consciousness and had not
26 suffered).

1 Because it is impossible to determine with certainty before the fact whether a particular
2 inmate will suffer unnecessary pain during his execution, the question whether a method of
3 execution will inflict unnecessary pain on an individual inmate is fundamentally an inquiry as to
4 whether the inmate is “subject to an unnecessary *risk* of unconstitutional pain or suffering.”
5 *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004) (emphasis added); *Fierro*, 77 F.3d at
6 307 (“*Campbell* also made clear that the method of execution must be considered in terms of the
7 *risk of pain*.” (emphasis in original)); *Campbell*, 18 F.3d at 687. “For any individual challenging
8 a death sentence, evidence of botched executions can only be put in terms of probability.” J.D.
9 Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the*
10 *Cruel and Unusual Punishment Clause*, 88 Iowa L. Rev. 1099, 1118-20 (2003). Of course, any
11 medical or quasi-medical procedure inherently carries a risk that a mistake or accident might
12 cause unforeseen pain. Thus, the Eighth Amendment does not require executioners to eliminate
13 all possible risk of pain or accident from their execution protocols. *See Campbell*, 18 F.3d at
14 687. A risk of pain becomes *unnecessary*, however, when experience with an execution
15 procedure demonstrates that there are foreseeable problems that could arise that would result in
16 the inmate suffering intense pain and the procedure fails to minimize or at least account for those
17 risks.

18 Thus, in the only two cases in which the Ninth Circuit has considered a method-of-
19 execution challenge, the court drew a distinction between an execution protocol that was
20 constitutional because it recognized and prevented a foreseeable risk of pain, and a procedure
21 that was unconstitutional because it inherently involved a substantial risk of pain. In upholding
22 Washington’s use of judicial hanging, the Ninth Circuit acknowledged the possibility of
23 “bungled” executions that could result in asphyxiation or decapitation, but held that the risk was
24 “slight” because Washington’s detailed execution protocol “minimized [the risk] as much as
25 possible.” *See Campbell*, 18 F.3d at 684-85, 687 & n.17. In contrast, the court held that
26 execution by lethal gas was unconstitutional because it involved a “substantial risk” of several
27 minutes of “intense physical pain.” *Fierro*, 77 F.3d at 308; *see also Rupe v. Wood*, 863 F. Supp.

1 1307, 1313-15 (W.D. Wash. 1994) (holding that a “significant” risk (less than 24% probability)
 2 of decapitation rendered judicial hanging unconstitutional as applied to an obese inmate),
 3 vacated in part as moot in light of Wash. Rev. Code § 10.95.180 (eff. June 6, 1996), 93 F.3d
 4 1434 (9th Cir. 1996).

5 Under these standards, the CDC’s lethal injection protocol is clearly unconstitutional
 6 because it creates a significant and substantial risk that the inmate will experience a prolonged,
 7 agonizing death. Although executions following Procedure No. 770, if performed properly
 8 under ideal circumstances, may not inherently involve unnecessary pain and suffering, Procedure
 9 No. 770 creates a procedure that is rife with potential problems and opportunities for untrained
 10 personnel to commit grave errors, all of which can lead to an excruciating death. The Procedure
 11 so utterly fails to account for these potential problems, which are inherent in allowing medically
 12 untrained personnel to perform executions by remote control, that executions performed
 13 according to Procedure No. 770 carry a significant and unconstitutional risk of unnecessary pain.

14 **a. Procedure No. 770 Creates a Tremendous Risk of Unnecessary Pain During**
 15 **Executions by Imposing Conditions Conducive to Botched Executions and**
 16 **Failing to Compensate for these Conditions**

17 Procedure No. 770 instructs that executions shall be carried out by means of an IV line
 18 inserted into a vein and monitored and controlled remotely, from a separate room. Procedure
 19 No. 770, at 36.¹ This line is “inserted into a usable vein by a person qualified . . . or otherwise
 20 authorized by law to initiate such a procedure.” *Id.* at 39. Once a flow of saline solution has
 21 been started, “injection team members vacate the chamber” and the chamber door is locked and
 22 sealed. *Id.* The injection team then causes five grams of sodium pentothal, an ultrashort-acting
 23

24
 25 ¹ Plaintiff is relying upon what the Office of the Attorney General describes as a “redacted
 26 version” of Procedure No. 770, provided to Mr. Morales on January 6, 2006. It is impossible to
 27 tell what has been redacted, as the defendants have never produced a complete copy of the
 28 protocol in litigation. *See Beardslee*, 395 F.3d at 1075 & n.12 (“Indeed, the State declined to
 produce significant portions of Procedure No. 770. . . . The State has advanced no legitimate
 reason, indeed, no reason at all, for its refusal to disclose the entire protocol to the condemned
 prisoner.”).

1 barbiturate anesthetic, to be administered through the IV. This dosage, if properly administered,
2 would be sufficient to induce unconsciousness in almost all people. Heath Decl. ¶ 9. Next, 100
3 milligrams of pancuronium bromide, which completely paralyzes both the inmate's voluntary
4 muscles and his diaphragm, is administered. Procedure No. 770, at 36; Heath Decl. ¶ 9.
5 Finally, the inmate is given 100 milligrams of potassium chloride, *see* Procedure No. 770, at 27,
6 which eventually – after two or more minutes – causes cardiac arrest.

7 Although the doses of sodium pentothal and pancuronium bromide each would, if given
8 alone, eventually cause death by stopping breathing, neither drug has sufficient time to cause
9 death before the potassium chloride is administered. *See* Heath Decl. ¶10. Thus, medical
10 evidence indicates inmates are alive at the time that the potassium chloride is injected. *Id.*
11 Potassium chloride, when given in doses sufficient to cause death, is known to be excruciatingly
12 painful, because it activates the nerves in the inmate's veins before it causes the heart to stop. *Id.*
13 ¶ 11. It is therefore imperative that inmates be anesthetized before the potassium chloride is
14 administered. *Id.* ¶¶ 12-13.

15 Administering the lethal drugs in the manner dictated by Procedure No. 770 creates the
16 risk that the sodium pentothal will not be administered properly and the inmate will not be
17 rendered fully unconscious by the time that the other two drugs are administered. Because
18 Procedure No. 770 fails to ensure the proper administration of sodium pentothal, the risk of
19 consciousness cannot be mitigated by the fact that the five-gram dose of sodium pentothal may
20 be excessive in comparison to the dose that would be used in a surgical setting. Although the
21 full five grams of sodium pentothal, if the dose reached the inmate, would be almost certainly
22 sufficient to induce unconsciousness, that fact is irrelevant in light of the substantial danger that
23 the full dose of sodium pentothal simply will not reach the inmate.

24 The risk that inmates will be conscious during their executions is in part inherent in the
25 use of sodium pentothal itself; CDC has chosen to use an ultrashort-acting anesthetic that is
26 extremely sensitive to errors in administration. In medical situations, sodium pentothal is used
27 only for specific, expeditious tasks, and only by personnel who have considerable expertise in
28

1 anesthesia. Heath Decl. ¶¶ 18, 23. Monitoring the effects of sodium pentothal, like those of
2 other ultrashort-acting anesthetics, requires considerable expertise in anesthesia. *Id.* ¶ 23.
3 Moreover, because sodium pentothal is extremely unstable, it must be carefully and properly
4 mixed so that it does not crystallize, a technical task that requires significant training in
5 pharmaceutical calculations. *Id.* ¶ 28. Thus, sodium pentothal's instability makes it more likely
6 to be administered incorrectly, and its fast-acting properties heighten the risk that improper
7 administration will result in ineffective anesthesia and consciousness.

8 The danger of improper administration of sodium pentothal is exacerbated by the fact that
9 Procedure No. 770 does not require medically trained personnel to supervise, or assist in the
10 medical tasks necessary to prepare for the execution. *See* Procedure No. 770, at 39 (stating only
11 that the person who inserts the IV shall have either some unspecified training, or be "authorized
12 by law" to initiate the procedure). These tasks include mixing the sodium pentothal solution,
13 Heath Decl. ¶¶ 20(a), 28; setting up the IV line and associated equipment, including the "Y"
14 injection site, in order to ensure that fluids do not leak and are not misdirected, *id.* ¶ 20(e), (f);
15 and finding a usable vein, properly inserting the IV line in the proper direction, and verifying that
16 the drugs are flowing into the inmate's vein rather than into surrounding tissue, *id.* ¶ 20(f), (h).
17 All of these tasks require a high degree of specialized training. *See id.* ¶ 23.

18 Procedure No. 770 makes several of these tasks more prone to mistakes by deviating
19 from established medical practice. The protocol creates the risk that the drugs will be
20 administered in the wrong order by requiring that the syringes be labeled by number, rather than
21 by contents. This is a serious deviation from accepted medical standards, which would never
22 permit such ambiguous labeling. *See id.* ¶ 20(b). If an error in loading or labeling the syringes
23 occurs, the personnel administering the drugs will have no means of detecting it. Second, the
24 protocol requires that the neoprene diaphragm on the "Y" injection site be pulled back to allow
25 the insertion of syringe tips instead of a needle. Procedure No. 770, at 36. There is no medical
26 reason for this modification of standard practice, which calls for a needle to be inserted *through*
27 the diaphragm in order to ensure a sealed connection. *See id.* ¶ 29. In addition, because the

1 drugs are administered from another room, IV line extensions must be used, *see* Procedure No.
 2 770, at 36, which increases the risk that a flaw or kink in the IV line will disrupt the flow of
 3 drugs. Heath Decl. ¶ 26. A reasonable medical standard of care would not permit these
 4 unnecessary line extensions.

5 The risk of inadequate anesthesia is compounded by the fact that Procedure No. 770
 6 requires that *no* personnel be present in the execution chamber when *any* of the drugs are
 7 administered. The protocol thus prevents personnel from obtaining any sort of visual or other
 8 verification that the drugs are actually being administered to the inmate, or that the sodium
 9 pentothal anesthetic has taken effect. Proper monitoring of the flow of fluids into the vein
 10 requires a clear view of the IV site, and also tactile examination of the skin surrounding the IV
 11 site to verify skin firmness and temperature. *Id.* ¶¶ 20(f), 24.²

12 Proper monitoring of the inmate would also necessitate that a person trained specifically
 13 in assessing anesthetic depth closely observe the inmate at all times after the sodium pentothal is
 14 administered. Only persons trained in anesthesia are able to assess properly whether the inmate
 15 has attained the degree of unconsciousness necessary to render him insensitive to pain. *Id.*
 16 ¶¶ 21-23. For this reason, the American Veterinary Medical Association (AVMA) requires that
 17 persons euthanizing animals be “competent in assessing depth [of anesthesia] appropriate for
 18 administration of potassium chloride.” *See 2000 Report of the AVMA Panel on Euthanasia*, 218
 19 J. Am. Veterinary Med. Ass’n 669, 681 (2001). Similarly, California requires extensive training
 20 in the use of anesthesia for all technicians authorized to euthanize animals. *See* 16 Cal. Admin.
 21 Code § 2039.

22 Thus, Procedure No. 770, by requiring that non-medical personnel remotely inject an
 23 unstable drug into inmates without proper monitoring, creates conditions that are highly
 24

25
 26 ² Although Procedure No. 770 provides that the flow of saline through the IV lines shall be
 27 observed when the lines are first put into place, *see* Procedure No. 770, at 39, the fact that the
 28 injection team vacates the execution chamber thereafter prevents any further monitoring once the
 flow of drugs is begun. Thus, the injection team would have no way of knowing if the inmate’s
 movement or some other event causes the IV lines to become dislodged or kinked.

1 conducive to serious errors that could cause the sodium pentothal to be administered improperly.
2 In the face of this danger, the protocol fails to take even the most rudimentary steps towards
3 minimizing the obvious potential problems. Indeed, the protocol is stunning in its complete
4 failure to acknowledge any risk or potential problem other than tampering with the lethal drugs
5 in the days leading up to the execution. *See* Procedure No. 770, at 31.

6 Examples of Procedure No. 770's failure to account for the very risks that it creates are
7 numerous. Despite the fact that the injection team personnel are not doctors or nurses who are
8 capable of exercising competent medical judgment based on the situation at hand, Protocol No.
9 770 contains no specific instructions for inserting the angiocath into the vein; what size should
10 be used; what to do if there is trouble finding an adequate vein; or how to compensate if any
11 equipment malfunctions. Similarly, Procedure No. 770 does not attempt to account for the
12 foreseeable issues that may arise when an inmate requires special consideration for any reason.
13 There is no provision for individualized dosage calculation or medical care for, for instance,
14 obese inmates who may require larger doses of sodium pentothal, or inmates on medications that
15 may interfere with the anesthetic. Nor is there any indication of how personnel should go about
16 exercising their discretion should these types of issues arise, or who bears responsibility for
17 making medical decisions on the scene. Indeed, the protocol does not specify whether the
18 injection team is in any way prepared to handle the contingencies that might occur during the
19 course of an execution, or provide that training should encompass foreseeable contingencies.
20 *See* Procedure No. 770, at 39.

21 Procedure No. 770 also does not attempt to minimize the risks inherent in handling the
22 drugs themselves. There is no procedure specified for obtaining, storing, and appropriately
23 labeling the drugs, all of which could affect their efficacy. There is no attempt to control the
24 problems created by the instability of sodium pentothal: There are no instructions on mixing the
25 sodium pentothal solution, beyond noting that the drug should be in "complete, clear
26 suspension," *id.* at 37, or any instruction to verify that the sodium pentothal has not crystallized
27 in the IV tubing or precipitated by the time it is actually used.

1 Despite Procedure No. 770's insistence on removing all personnel from the execution
2 chamber before any drugs are administered, the protocol does not anticipate and provide for the
3 problems that could arise as a result of this policy. There is no procedure for testing or verifying
4 the efficacy of the extended IV tubing, or even any instruction on precisely how to set up the
5 tubing. Nor is there a procedure for entering the chamber during the execution should any of the
6 equipment malfunction or the inmate somehow indicate that something has gone awry.
7 Although the protocol calls for a heart monitor, there is no indication of who observes the
8 monitor or what the team would do if the monitor indicated a problem.

9 Finally, and most disturbingly, the protocol apparently does not require execution
10 personnel to verify in *any* manner, even through the windows of the execution chamber, that the
11 inmate has been rendered unconscious by the sodium pentothal. Nor does the protocol call for a
12 backup syringe of sodium pentothal to be readied in case something goes wrong. *See* Procedure
13 No. 770, at 37; *cf.* Heath Decl. ¶ 46 (noting use of a backup syringe of sodium pentothal in other
14 states). Thus, despite the foreseeable risks created by the protocol and described above,
15 Procedure No. 770 simply does not acknowledge, much less provide for, the possibility that the
16 five-gram dose of sodium pentothal will fail to render the inmate unconscious.

17 Procedure No. 770 thus both creates an unacceptable quantum of risk that the inmate will
18 not be anesthetized and therefore will suffer excruciating pain during his execution, and also fails
19 utterly to account for these obvious contingencies and instruct personnel on how to react to or
20 prevent them. In this respect, the lethal injection protocol is starkly different from the judicial
21 hanging protocol that the Ninth Circuit upheld in *Campbell*, 18 F.3d at 683. Like the risk that an
22 inmate will be conscious and in excruciating pain during the lethal injection process,
23 Washington's judicial hanging procedure carried the risk that an inmate would die of
24 asphyxiation, which is slow and painful, or decapitation, which mutilates the inmate's body. *See*
25 *id.* at 683. Unlike the CDC's protocol, however, Washington's protocol carefully acknowledged
26 these risks and provided detailed procedures specifically designed to minimize them. Thus, as
27 the court noted, Washington's protocol reflected medical opinions as to the manner in which
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different methods of hanging would kill inmates and which modes of causing death were the most humane. *Id.* In order to avoid death by asphyxiation or decapitation, the protocol included detailed instructions on numerous factors that would affect the manner of death, including the diameter of the rope; the method of tying the knot; treating the rope with wax and boiling it to reduce elasticity; and the length of the drop in relation to body weight and the manner in which that length should be calculated. *Id.* at 683-85. All of these instructions were the result of careful consideration of the available scientific and medical evidence. In light of the Washington protocol's ample provision for the risks of an inhumane death, the Ninth Circuit concluded that the risk of a botched execution was "slight," and had been "minimized as much as possible." *Id.* at 687 & n.17; *Fierro*, 77 F.3d at 307 (emphasizing that the *Campbell* court considered hanging in terms of the "risk of pain," and concluded that "under the Washington hanging protocol, the risk of a prolonged and agonizing death by asphyxiation or decapitation was negligible" (emphasis in original)).

In contrast to Washington's protocol, it is impossible to detect in the version of Procedure No. 770 currently available any attempt on CDC's part to account for any problems that could arise during an execution. This failure is particularly egregious in light of the fact that simply having a qualified person verify, visually and tactically, that the inmate is indeed anesthetized following the administration of the sodium pentothal, would go a long way towards mitigating the risk of unnecessary pain. Yet it does not appear that CDC has considered this or any other means of lessening the dangers created by the protocol. This egregious failure renders the significant risk of error truly unnecessary. *Cf. Campbell*, 18 F.3d at 687 & n.17.

b. The Use of Pancuronium Bromide in Combination With Sodium Pentothal Creates a Significant Risk that Inmates Will Be Conscious, But Unable to React, During Their Executions

In light of the fact that sodium pentothal is an ultrashort-acting anesthetic, and Procedure No. 770 creates the risk that the dose will not be properly administered, it is particularly important that the inmate have the opportunity to alert execution personnel should he regain – or never lose – consciousness, and that the execution personnel have the ability to ascertain whether

1 the inmate is properly anesthetized. Yet the use of pancuronium bromide in combination with
2 sodium pentothal effectively prevents any post-administration correction of problems with the
3 sodium pentothal. It also serves no purpose within the lethal injection process, raising the
4 question why the State insists on employing it while refusing to justify its use. *See Beardslee*,
5 395 F.3d 1075-76 & n.13 (“The State did not, even under repeated questioning at oral argument,
6 provide a single justification for the use of pancuronium bromide, which is one of the key issues.
7 This response is, to say the least, troubling.”).

8 Pancuronium bromide is a neuromuscular blocking agent that blocks nerve cells from
9 interacting with muscle tissue, therefore paralyzing the inmate’s muscles, including those of the
10 chest and diaphragm. Heath Decl. ¶¶ 37-38. A patient given pancuronium bromide alone would
11 slowly suffocate to death; thus, the unanesthetized experience of the effects of pancuronium
12 bromide would in itself involve extraordinary suffering, as the inmate struggled to breathe. *Id.*
13 ¶ 41. Because the drug does not affect the brain or nerves themselves, however, so an
14 unanesthetized patient would remain completely conscious, but due to the paralysis would be
15 completely unable to communicate either verbally or by movement the fact that he is conscious.
16 *Id.* ¶¶ 39-40.

17 Pancuronium bromide also prevents observers from determining whether an inmate is
18 conscious. According to Dr. Heath, the drug’s paralytic effect is so total that it would interfere
19 with an *anesthesiologist’s* ability to assess consciousness. *Id.* Thus, even if Procedure No. 770
20 provided some mechanism by which personnel could monitor the inmate’s consciousness, the
21 use of pancuronium bromide all but ensures that it will be impossible to determine visually
22 whether the inmate is still able to feel pain. Should an inmate retain consciousness after the
23 sodium pentothal is administered, the inmate would suffer slow suffocation as well as the
24 excruciating pain of the potassium chloride, all while being completely paralyzed and unable to
25 communicate. *Id.* ¶ 37-38. This period would last at least a minute, until the inmate loses
26 consciousness from suffocation or is killed by the potassium chloride. *Id.*

1 It is precisely this risk of the combination of ineffective anesthesia and paralyzed
 2 consciousness that has led at least nineteen states to prohibit the use of a sedative in conjunction
 3 with a neuromuscular blocking agent like pancuronium bromide to euthanize animals. *See*
 4 *Beardslee*, 395 F.3d at 1073 & n.9 (listing the relevant state laws and noting that this evidence is
 5 “somewhat significant”). The AVMA, moreover, has promulgated guidelines that prohibit this
 6 combination of drugs. *See 2000 Report of the AVMA Panel on Euthanasia, supra*, at 681.
 7 AVMA also prohibits the use of neuromuscular blocking agents alone, stating that because the
 8 drugs cause “respiratory arrest before loss of consciousness, . . . the animal may perceive pain
 9 and distress after it is immobilized.” *Id.* at 696 app. 4. The fact that so many states and the
 10 nation’s leading veterinary association have condemned as inhumane the use of anesthetics and
 11 neuromuscular blocking agents in tandem is persuasive evidence that this combination of drugs
 12 is not consistent with evolving standards of decency. Given that the Eighth Amendment
 13 prohibits the same infliction of unnecessary pain that we seek to avoid imposing on household
 14 pets and other animals, the veterinary avoidance of this method of euthanasia is compelling
 15 indeed.

16 Despite the evidence that employing pancuronium bromide is not consistent with basic
 17 standards of care for animals, and the fact that the use of pancuronium bromide increases the risk
 18 that an inmate will suffer unnecessary pain, the CDC insists on using it while refusing to explain
 19 its reasons for doing so. In previous execution challenges, the defendants’ experts have
 20 conceded that pancuronium bromide is used primarily to prevent witnesses from observing
 21 movement that “could be interpreted as . . . pain or discomfort.” *Beardslee*, 395 F.3d at 1076
 22 n.13 (noting that “[t]he record does not contain any other explanation” for the use of
 23 pancuronium bromide). The paucity of the record accords with Dr. Heath’s opinion that
 24 pancuronium bromide serves no legitimate purpose in the execution procedure while greatly
 25 increasing the risk of an inmate’s suffering undetected agony.

26 **c. The Risk Created by Procedure No. 770 Has Been Realized in California**
 27 **Executions**
 28

1 There is ample evidence that Procedure No. 770 has caused some inmates executed in
2 California to experience unnecessary pain during their executions. Both execution records and
3 witnesses' accounts of these executions provide evidence that is consistent with consciousness
4 following the administration of the sodium pentothal. As the Ninth Circuit has held, both
5 eyewitness accounts of, and medical information gleaned from, executions can be probative of
6 whether an inmate has likely suffered pain during his execution. *See Fierro*, 77 F.3d at 307-08;
7 *Campbell*, 18 F.3d at 685. This evidence in turn can help courts determine the overall risk of
8 unnecessary pain created by a method of execution, even if the sample size of past executions is
9 small. *See Campbell*, 18 F.3d at 687 (relying in part on a physician's observations of the only
10 hanging conducted according to the challenged protocol in upholding Washington's execution
11 procedure).

12 Witness accounts of the 2002 execution of Stephen Wayne Anderson suggest that Mr.
13 Anderson was not properly anesthetized when he died. The execution took over 30 minutes, and
14 during that time Mr. Anderson's chest and stomach "heaved more than 30 times." Rocconi Decl.
15 ¶ 6, Heath Decl. Ex. 3. According to Dr. Heath, the typical reaction to sodium pentothal is
16 yawning, drawing one or two deep breaths, or visibly exhaling so that the cheeks puff out. Heath
17 Decl. ¶ 45. Irregular heaving of the chest is not consistent with the depression of the central
18 nervous system caused by sodium pentothal. *Id.* Rather, chest heaving is indicative of labored
19 respiratory activity, which in turn strongly suggests that Mr. Anderson was conscious, and
20 indeed may have been laboring against the paralyzing effect of the pancuronium bromide. *Id.*

21 The execution log of Manuel Babbit's 1999 execution also indicates that something went
22 wrong during the process. A minute after the pancuronium bromide was administered, Mr.
23 Babbit had shallow respirations and brief spasms in his upper abdomen – again suggesting an
24 attempt to fight against the effects of the pancuronium bromide. *See id.* ¶ 47; Execution Log of
25 Manuel Babbit, Heath Decl. Ex. 2. In addition, Mr. Babbit's heart rate remained constant until
26 the potassium chloride was administered; had the full five grams of sodium pentothal reached
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1 Babbit, his heart rate would have changed significantly. Heath Decl. ¶47. His distress was
2 evident to witnesses. Declaration of Charles Patterson, Exhibit B.

3 The execution logs of William Bonin's 1996 execution also reflect irregularities that may
4 have caused Bonin to die in excruciating pain. Mr. Bonin was given a second dose of
5 pancuronium bromide for reasons that remain unclear, even though the initial dose would
6 paralyze an inmate for several hours. Execution Log of William Bonin, Heath Decl. Ex. 2;
7 Heath Decl. ¶ 46. The redundant dose raises questions about whether Bonin received the initial
8 doses of sodium pentothal and pancuronium bromide; whether the injection team believed that
9 he was still conscious; and, more broadly, whether such an irregularity is indicative of the lack of
10 training or judgment of injection personnel. Heath Decl. ¶ 46.

11 These accounts of recent California executions, according to the Ninth Circuit, are
12 "extremely troubling," because they indicate "that there were problems associated with the
13 administration of the chemicals that may have resulted in the prisoners being conscious during
14 portions of the executions." *Beardslee*, 395 F.3d at 1075.

15 **d. The Deficiencies in Procedure No. 770 are the Result of CDC's Conscious**
16 **Choices**

17 Procedure No. 770's failure to mitigate the obvious risks that it creates is the result of
18 conscious choices made by CDC. California's lethal injection statute, Cal. Penal Code §
19 3604(a), gives the Department of Corrections almost total discretion over the means by which
20 inmates are executed: CDC is responsible for choosing the drugs that comprise the lethal
21 injection cocktail; developing the procedures by which the drugs are administered; and
22 determining what training and qualifications, if any, are required for the execution team. CDC
23 has chosen to exercise this discretion in a manner that creates a foreseeable and known risk that
24 inmates will suffer excruciating pain before their deaths.

25 The choices made by other state corrections departments and legislatures highlight the
26 irresponsibility of CDC's protocol. Several states employ physicians or other qualified medical
27 personnel to approve the design of the protocol or to ensure that executions are carried out in a
28 medically acceptable manner. *See* Heath Decl. ¶30. Georgia, for instance, has doctors present

1 during the execution process to insert the IV lines if necessary. See J. Groner, *Lethal Injection:*
2 *A Stain on the Face of Medicine*, available at [http://bmj.bmjournals.com/cgi/content/full/](http://bmj.bmjournals.com/cgi/content/full/325/7371/1026)
3 325/7371/1026 (last visited Jan. 12, 2006). Connecticut's protocol is developed in consultation
4 with the Commissioner of Public Health. See Conn. Gen. Stat. § 54-100 (West 2005). Other
5 states have mandated that the execution process must comply with accepted medical standards or
6 be humane. See Idaho Code § 19-2716 (Michie 2005) (requiring "expert technical assistance"
7 where necessary to ensure that death does not cause "unnecessary suffering"); Kan. Crim. Proc.
8 Code Ann. § 22-4001 (West 2005) (requiring that drug combination be sufficient to "cause death
9 in a swift and humane manner"). CDC could commit itself to ensuring a humane process, or to
10 seeking assistance from physicians, but it has chosen not to do so, and to deviate from accepted
11 medical practice in several respects, thereby consciously disregarding the very real risk of
12 botched executions.

13 Just as incomprehensibly, CDC has chosen to use drugs that are extremely sensitive to
14 error, in that sodium pentothal can wear off quickly if not administered correctly, and
15 pancuronium bromide will mask the inmate's resulting consciousness. For precisely this reason,
16 the AVMA has chosen to use pentobarbital, a longer-acting anesthetic, in animal euthanasia, and
17 bars entirely the use of an anesthetic in combination with a neuromuscular blocker like
18 pancuronium bromide. See *2000 Report of the AVMA Panel on Euthanasia*, *supra*, at 680-81.
19 Thus, it is clear that other means of causing death by injecting lethal chemicals are available, and
20 that considerations of good medical practice and preventing pain and consciousness are not
21 incompatible with the aim of causing death.

22 The CDC's deliberate decision to use volatile drugs in a manner conducive to error is
23 unconscionable. Although, as the *Beardslee* court noted, "objective evidence of contemporary
24 values" may indicate "that lethal injection has been deemed an acceptable means for society to
25 implement a death sentence," 395 F.3d at 1072, it is ultimately the manner in which the CDC has
26 chosen to implement lethal injection that must withstand Eighth Amendment scrutiny. The
27 available alternatives to the CDC's callous protocol, and the relatively minimal changes in
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1 procedure that could substantially mitigate the risk of excruciating pain, demonstrate that the
2 protocol chosen by CDC creates a preventable, and therefore unnecessary, risk of an
3 excruciatingly painful death.

4 **e. Conclusion**

5 Like the lethal gas method of execution held unconstitutional in *Fierro*, California's
6 lethal injection protocol creates a significant risk that an inmate will experience excruciating pain
7 for several minutes. *See Fierro*, 77 F.3d at 307. This risk is inherent in the design of the
8 protocol, with its insistence on remote administration and its choice of drugs, and is aggravated
9 by Procedure No. 770's failure to account for the problems that could arise as a result.

10 The risk of unnecessary pain is clearly more substantial than the slight or negligible risk
11 that may be characterized as an "accident" or anomaly. *See Campbell*, 18 F.3d at 687. Available
12 information from California executions and those performed in other states indicates the strong
13 possibility that at least some of these inmates were not properly anesthetized during their
14 executions. While it is impossible to quantify precisely the risk of pain that an individual inmate
15 like Mr. Morales faces when he enters the execution chamber, the nature of the risk renders it
16 more substantial than might otherwise be the case. Because the potential problems are *caused by*
17 Procedure No. 770, every inmate, regardless of his health or size, faces the risk of unnecessary
18 pain during his execution. The risk is not dependent on unforeseeable contingencies, such as an
19 uncontrollable electrical problem, *see Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464
20 (1947), but simply increases if an inmate's individual characteristics make him less receptive to
21 anesthesia.

22 The Ninth Circuit has twice affirmed a district court's refusal to stay an execution based
23 on a challenge to California's lethal injection protocol, but both times the court has emphasized
24 that it was not deciding the merits, but was merely reviewing whether the district court abused its
25 discretion in denying a motion for preliminary relief. *See Beardslee*, 395 F.3d at 1076; *Cooper*,
26 397 F.3d at 1034 (Browning, J., concurring). Indeed, in *Beardslee*, the court repeatedly noted
27 that Beardslee had raised "troubling" questions about the administration of Procedure No. 770,
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1 but concluded that “ultimate resolution of the merits of this issue . . . will have to await another
2 day.” 395 F.3d at 1075-76. Since that decision, a growing body of evidence has dispelled any
3 doubt that the problem of botched lethal injections is a real one. Mr. Morales deserves to have
4 his challenge considered on a full record after discovery.

5
6 **C. MR. MORALES WILL SUFFER IRREPARABLE HARM IF
TEMPORARY RELIEF IS NOT GRANTED**

7 If the State is not enjoined from executing Mr. Morales in accordance with Procedure No.
8 770, Mr. Morales will suffer irreparable harm. The excruciating pain that Mr. Morales will
9 suffer during his execution clearly constitutes irreparable harm. *See Jolly v. Coughlin*, 76 F.3d
10 468, 482 (2d Cir. 1996) (holding that continued pain and suffering resulting from deliberate
11 medical indifference is irreparable harm). Moreover, he will have no meaningful retrospective
12 remedy, as he will no longer be alive. Indeed, the State’s violation of Mr. Morales’s Eighth
13 Amendment rights in itself warrants a presumption of irreparable harm, as the Ninth Circuit
14 “ha[s] stated that an alleged constitutional infringement will often alone constitute irreparable
15 harm.” *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*,
16 950 F.2d 1401, 1412 (9th Cir. 1991) (internal quotation marks omitted).

17 **D. THE BALANCE OF HARDSHIPS FAVORS MR. MORALES**

18 The balance of hardships tips sharply in Mr. Morales’ favor. In requesting preliminary
19 relief, Mr. Morales seeks simply to maintain the status quo while he litigates his claim that the
20 lethal injection procedure is unconstitutionally painful. Without this relief, Mr. Morales will be
21 unable to build a record establishing the danger presented by Procedure No. 770 before he
22 himself is executed. The State, in contrast, will suffer no harm if Mr. Morales’s execution is
23 stayed pending the resolution of this action. *See Gomez v. U.S. Dist. Ct. for Northern Dist. of*
24 *Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate)
25 (“The state will get its man in the end. In contrast, if persons are put to death in a manner that is
26 determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers
27 an injury that can never be repaired.”). The State has not yet set an execution date; thus, it will
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1 not be forced to reschedule the execution, and the public as yet has no expectation that Mr.
2 Morales will be executed on a particular date.

3 Mr. Morales has not delayed unduly in bringing this claim, and his diligence in pursuing
4 the claim demonstrates that he is not attempting to manipulate the judicial process in any
5 manner. *Cf. Gomez v. U.S. Dist. Ct. for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992)
6 (holding that particularly where an inmate has engaged in “abusive delay,” the court may
7 consider the State’s interest in moving forward with the execution in balancing the equities). Mr.
8 Morales’s challenge to the method of execution did not become ripe until his appeals were
9 exhausted and it became clear that he would be executed by lethal injection. *See LaGrand v.*
10 *Stewart*, 170 F.3d 1158, 1159 (9th Cir. 1999) (stating that the petitioner’s challenge to the
11 method of execution had previously been dismissed as premature because the method of
12 execution had not yet been chosen); *see also Beardslee*, 395 F.3d at 1069 n.6 (stating that
13 uncertainty as to when method-of-execution challenge became ripe weighed in Beardslee’s
14 favor). Thus, Mr. Morales could not have filed this suit until after his federal habeas petition was
15 denied.

16 After the United States Supreme Court denied certiorari on Morales’s habeas petition and
17 the stay of execution of execution was lifted, Mr. Morales moved promptly to assert his claim.
18 Unlike in *Cooper* and *Beardslee*, Mr. Morales has not waited until his execution is imminent to
19 file this suit. *Cf. Beardslee*, 395 F.3d at 1066-67 (Beardslee filed suit one month before his
20 execution date, after it was already scheduled); *Cooper*, 379 F.3d at 1030-31 (Cooper filed suit
21 eight days before his scheduled execution).

22 E. GRANTING TEMPORARY RELIEF IS IN THE PUBLIC INTEREST

23 An inmate’s claim that California’s lethal injection protocol causes unconstitutional
24 wanton pain and suffering implicates the public interest. *See Beardslee*, 395 F.3d at 1067 (“In
25 cases where the public interest is involved, the district court must also examine whether the
26 public interest favors the plaintiff.”). Because Mr. Morales alleges that the State of California
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1 will violate his Eighth Amendment rights by executing him in accordance with Procedure No.
2 770, it is paramount to the public interest that Morales's claims be resolved on the merits.

3 Lethal injection has become the predominant method of execution because it is widely
4 believed by officials to be, and is perceived by the general public as, the most humane form of
5 execution. See S. Russell, *The Execution of Stanley Tookie Williams; Injection: Designed to*
6 *Make Execution More Humane*, SFGate.com, available at [http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/14/MNG05G7QM61.DTL)
7 [bin/article.cgi?f=/c/a/2005/12/14/MNG05G7QM61.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/14/MNG05G7QM61.DTL) (last visited Jan. 12, 2006). In
8 choosing lethal injection on the assumption that it is painless, the California state legislature has
9 concluded that employing the most humane method of execution possible is in the public
10 interest. There is now compelling evidence, in the form of eyewitness accounts and medical
11 evidence and opinion, that lethal injection protocols like the one used in California create a
12 significant and unacceptable risk of inflicting unnecessary pain. The Ninth Circuit has twice
13 been denied the opportunity to consider the constitutionality of California's Procedure No. 770
14 because the district court declined to stay the inmates' executions, and both times the circuit
15 court has indicated that it could decide the merits only on a full record. Definitively resolving
16 the important and pressing question of the constitutionality of Procedure No. 770 is entirely in
17 the public interest, and therefore granting temporary relief so that Mr. Morales may remain alive
18 while the parties conduct discovery into this issue also furthers the public interest.

19 There are no countervailing considerations suggesting that granting temporary relief
20 would hurt the public interest. Mr. Morales has not engaged in abusive delay, nor is this suit an
21 attempt simply to put off his execution. As noted above, Mr. Morales's execution date has not
22 been set, so there are no expectations that his sentence will be carried out by a given date.
23 Where an inmate presents a meritorious claim of constitutional dimension and is not attempting
24 to manipulate the judicial process, it cannot possibly be in the public interest to allow the State to
25 execute him using the very method that he challenges.

1 **IV. CONCLUSION**

2 Michael Morales is not attempting to prevent the State from executing him. He simply is
3 demanding the constitutional protection to which he is entitled, by requesting that this Court
4 ensure that he is not executed in an unconstitutional manner. To avoid the risk that Mr.
5 Morales's execution will be performed in such a manner as to cause him to suffer minutes of
6 torture immediately preceding his death, Mr. Morales is entitled to relief under 42 U.S.C. § 1983.

7 Accordingly, Mr. Morales requests that the Court issue a temporary restraining order
8 preventing defendants from executing him by means of lethal injection under the protocol
9 currently in effect in the State of California.

10
11
12 Respectfully submitted,

13 Dated: January 17, 2006

14
15 MICHAEL ANGELO MORALES

16
17 By: /s/
John R Grele

18 Dated: January 17, 2006

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CALIFORNIA STATE PRISON
SAN QUENTIN

Issue Date: 10/01/92

Revised Date: 6/13/03

I. LETHAL INJECTION CHAMBER, SAN QUENTIN STATE PRISON
(REDACTED)

San Quentin Operational Procedure No. 770

II. PURPOSES AND OBJECTIVES

The purpose of this plan is to establish the procedure for the care and treatment of inmates from the time an execution date is set through execution by lethal injection. In addition, this plan identifies staff responsibilities pursuant to preparation for executions and operation of the Lethal Injection Chamber.

III. REFERENCES

California Penal Code Sections: 1193, 1217, 1227, 3600, 3601, 3603, 3604, 3605, 3700, 3700.5, 3701, 3702, 3703, 3704, 3704.5, 3705, 3706.

California Administrative Manual, Article 2, Legal Executions, Sections 6200(a) through (f). (See Resource Supplements REF. 1-4.)

California Code of Regulations, Title 15

California Department of Corrections Operations Manual

IV. APPROVAL AND REVIEW

This plan will be reviewed and/or revised by the Chief Deputy Warden annually in the month of October and forwarded to the Warden for approval prior to submitting the manual to the Director of Corrections.

This Institution Procedure is confidential and may be reviewed by staff with the need to know at the Warden's office only.

V. RESPONSIBILITY

- A. The Warden is responsible for the overall operation of this procedure.
- B. The Chief Deputy Warden is responsible for the security of the institution in the event of a scheduled execution.
- C. The Lieutenant in Charge of the execution chamber is responsible for monitoring and ensuring that this procedure is followed.
- D. The Associate Warden, Unit III will be familiar with all aspects of this plan.

VI. METHODS

Execution dates are set in accordance with the provisions of Penal Code Sections 1193 and 1227.

The first execution date for an individual is set under the provisions of Penal Code Sections 1193. The execution date must be scheduled no sooner than 60 days, but no later than 90 days from the 1193 PC hearing.

All subsequent execution dates are set under the provision of Penal Code Sections 1227. Execution dates set under this provision of the penal code sections must be scheduled no sooner than 30 days, but no later than 60 days from the 1227 PC hearing.

A. Chronology of Events Prior to Execution:

1. Upon receipt of the execution order:

a. The Warden will:

- 1) Notify the Director of Corrections via the Deputy Director - Institutions Division by telephone, if the execution appears imminent, followed with a copy of the execution order to the Director of Corrections, via the Deputy Director of Institutions.
- 2) Together with the Legal Affairs Coordinator and Associate Warden, Unit III interview the inmate to be executed, serve the execution order, and document the interview on the Service of Execution Warrant Form.
- 3) Notify the Governor's Legal Affairs Secretary by mail of the scheduled execution with a copy of the execution order enclosed. Notify the Director of Corrections via the Deputy Director - Institutions Division of the scheduled execution.
- 4) Submit to the Director via the Deputy Director - Institutions Division, the names of three (3) psychiatrists who will serve as the required panel of alienists. The alienists will be employees of the Department of Corrections who have previously received the approval of the Director.
- 5) Secure from the Case Records Manager the central file of the inmate, which will be maintained in the Warden's office seven days prior to the date of execution.

b. The Chief Deputy Warden will:

- 1) Prepare to activate execution security plan.

c. The Associate Warden, Unit III will:

- 1) Move inmate to designated area. Inmates housed in East Block will be moved to the first tier upon receipt of the warrant. Inmates in North Segregation will remain in their assigned cells. Inmates in the Adjustment Center will remain in their assigned cells. Five days prior to an execution, inmates will move to a designated cell in North Segregation. Inmates in the Adjustment Center may be moved to North Segregation or remain in the Adjustment Center at the discretion of the Warden.
- 2) Implement hourly checks and logs by Condemned Unit staff.
- 3) Direct the Condemned Unit staff to commence documentation of the inmate's behavior on CDC 128B on each shift. These 128B's will be forwarded daily to the Legal Affairs Coordinator via the Associate Warden, Unit III. Any documentation regarding unusual behavior will be brought to the attention of the Warden.
- 4) Initiate daily contact with unit on procedural follow through.

d. The Legal Affairs Coordinator will:

- 1) Act as liaison between the inmate's family and the Warden, answering questions the family may have, and coordinating visits and other communication between the inmate and his or her family. In addition, if necessary, the Legal Affairs Coordinator will make telephone contact with the inmate's family or attorney prior to the mailing of any necessary notifications regarding the execution, informing the family that the correspondence will be forthcoming and explaining its purpose and necessity. The Legal Affairs Coordinator will attend all meetings of the execution team.
- 2) Direct the Administrative Assistant to direct the mailroom Sergeant to deliver all non-legal incoming mail for the inmate to the Administrative Assistant to be inspected, logged and forwarded to the inmate via the oncoming Third Watch Condemned Row Sergeant. Mail that is sent to the inmate by anonymous senders, containing offensive messages, will be hand carried to the inmate by the Condemned Row Correctional Counselor II. The Correctional Counselor II will give the inmate the option to accept or reject the offensive correspondence. The

Administrative Assistant will instruct the First Watch Condemned Row Sergeant to inspect and log all non-legal outgoing mail from the inmate. The Condemned Row Sergeant will forward any unusual mail immediately to the Administrative Assistant for the Warden's attention. This process must be handled expeditiously to avoid unnecessary delay of outgoing or incoming mail in this category.

- 3) Receive from the Visiting Lieutenant a copy of the list of approved visitors. A print-out of visits will be provided and filed in the pre-execution record.
- 4) Instruct the Office Assistant who schedules legal visiting to give priority accommodations to the attorney for the inmate. If a scheduling problem occurs, the Legal Affairs Coordinator will immediately be notified.
- 5) Construct a file on the inmate that shall contain all pertinent court documents; i.e., execution order, etc., a biographical information sheet from the Public Information Officer's condemned data, photocopy of the visiting card(s), Service of Execution Warrant form, pre-execution activity log, behavior 128B's, and any other pertinent information. This file shall be kept at hand in the Legal Affairs Coordinator's office. In the event the execution is stayed, the file will be closed and filed in the Legal Affairs Coordinator's office.
- 6) Update the list of scheduled executions and distribute it to the Administrative Officer of the Day (AOD) book, Chief Deputy Warden, Associate Warden, Unit III, Visiting Lieutenant, Mailroom Sergeant, Chief Psychiatrist and Chaplains.

e. The Public Information Officer will:

- 1) Advise the Assistant Director of Communications, by telephone, of the execution date. Coordinate with the Assistant Director of Communications a press release for release to inquiries of news media agencies.

f. The Visiting Lieutenant will:

- 1) Flag the computer file in the memo field with the following instruction:
 - (a) Priority Visiting Privileges. Do not turn away visitors without approval of Warden or Administrative Officer of the Day (AOD). Notify Warden's office (Public Information Officer) seven days prior to imminent execu-

tion of each visit that this inmate has on the day that it occurs, or if on weekend or holiday, the next workday.

The Visiting Lieutenant will ensure that these instructions are complied with.

- 2) Make photocopies of the inmate's visiting file along with a computer print-out of all approved visitors and deliver them to the Legal Affairs Coordinator so that visits can be filed in the pre-execution file.
- 3) Ensure that the attorney for the inmate is afforded every assistance in expeditiously having access to his or her client. In the final weeks prior to the execution, this may include facilitating attorney visits during weekends and holidays should such be necessary.
- 4) Upon receipt of a warrant of execution for an inmate, and when it appears the execution is imminent, the Visiting Lieutenant will be notified that all visiting for a Grade A inmate will take place in the plexiglass booths of the Main Visiting Room during normal visiting hours. A correctional officer will be assigned to provide constant and direct supervision of the visit.

Grade B inmates will continue to receive non-contact visits in Main Visiting.

- 5) Beginning at least five (5) days prior to the scheduled execution, the following visiting procedure will be adhered to:
 - (a) Non-legal visitors will be limited to family members only. If the inmate does not have family members visiting him or her, non-legal visits will be limited to individuals who have an established history of visiting the inmate.
 - (b) Grade B inmates will continue to receive non-contact visits during designated visiting hours.
 - (c) A state vehicle will be supplied to transport visitors from the East Gate to the Visiting Room.
 - (d) The inmate will visit in waist restraints and handcuffs.
 - (e) The inmate and the visitor(s) may briefly embrace or shake hands at the beginning and

end of the visit. No other physical contact will be allowed.

- 6) In the event there is a scheduled attorney visit, the following procedures will apply:
 - (a) Attorneys and approved visitors of the inmate will not be permitted to visit with the inmate simultaneously.
 - (b) For an attorney/client confidential visit, the attorney will be allowed to bring the following items:
 - (1) One pen or pencil;
 - (2) One note pad;
 - (3) Necessary legal materials.
 - (c) For attorney/client confidential visits, the inmate will be removed from the conference room and proceed with his attorney visit in the plexiglass visiting area under constant visual observation by the special visiting team.
 - 7) All visiting for the inmate will cease once he/she is placed in the overnight cell in the chamber area. Attorneys may have access to their client by phone as requested.
- g. The Lieutenant in Charge of the Chamber will:
- 1) Ensure that the execution chamber is ready.
 - 2) Ensure no individuals enter the chamber area without specific approval of Warden.
- h. The Condemned Row Correctional Counselor II will:
- 1) Maintain close daily contact with the inmate upon service of the execution warrant.
 - 2) Interview and assess the inmate's behavior and attitude upon conclusion of visits and prior to returning to his cell.

2. 45 - 20 days prior to the execution:

- a. The Warden will:
- 1) Approach those reputable citizens known to him/her that would be willing to serve as official witnesses to the execution. The Warden shall confirm the

availability and willingness to participate of twelve (12) official witnesses and two (2) or more alternates.

- 2) Compile and submit to the Director of Corrections via the Deputy Director, Institutions the original documents of the 20-day pre-execution report of the alienists pursuant to Penal Code 3700.5. The Director of Corrections shall forward the document to the Governor's Legal Affairs Secretary via the agency secretary, Youth and Adult Correctional Agency. The 20-day report shall be comprised of the following:
 - (a) A current psychiatric report.
 - (b) Comments of the chaplain attending the inmate.
 - (c) A summary of the inmate's conduct and behavior.
 - (d) A cover letter from the Warden addressing the above and any first-hand information obtained from observations, interviews, or communication with family and friends of the inmate.

The 20-day report is to be delivered to the Deputy Director, Institutions Division 28 days prior to the scheduled execution.

b. The Psychiatrists (Alienists) will:

- 1) Interview and examine the inmate within sufficient time so as to evaluate the findings and give written report to the Warden within the Warden's 20-day report deadline. The written reports shall include an interpretation of the examinations, interviews, and history stated in lay wording. Information available to one psychiatrist pertinent to the inmate's sanity shall be made available to the other two psychiatrists for evaluation and inclusion in the appropriate psychiatric reports.
- 2) The Alienist panel will make an appointment with the Warden prior to submission of the 20-day report. The Alienist panel will review with the Warden the inmate's psychiatric report. This meeting will include all psychiatric staff who may have observations and information regarding the inmate. This information will be shared with the Warden.
- 3) For imminent executions, the Warden will select a member of the Alienist panel who, along with the

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Chief Medical Officer, will ensure the following is complied with:

- (a) Any medication ordered for the inmate will have prior approval of the Chief Medical Officer or the selected Alienist panel member.
 - (b) The selected Alienist panel member and the Chief Medical Officer will develop a 24-hour call schedule in which one of them will be available either by telephone or pager to approve or deny a recommended medication prescription for the inmate.
- 4) An Alienist selected by the Warden will review the unit hourly check logs completed on the inmate on a daily basis notifying the Warden of any unusual behavior. The same procedure will be followed for the 15 minute check logs normally begun five (5) days prior to the scheduled execution.
- c. The Chaplain will:
 - 1) Interview the inmate as needed to assess his spiritual and emotional well-being. The chaplain attending the inmate's religious needs will determine the inmate's religious preferences and needs, next of kin, funeral or other requests, attitudes or thoughts on death and dying, and any observations as to his emotional stability such as acceptance of his sentence, etc. The chaplain will formulate his observations into a written report and submit it to the Warden within sufficient time to meet the Warden's 20-day report deadline.
- d. The Condemned Row Correctional Counselor II will:
 - 1) Assess the observations of the inmate's counselor and custody staff, and research the case history to determine the inmate's past and present conduct and behavior. This information will be submitted in writing to the Warden within sufficient time to meet the Warden's 20-day report deadline.
- e. The Public Information Officer will:
 - 1) Coordinate with the Assistant Director, Communications to announce to the media via recognized wire services that the execution is scheduled and any media representatives wishing to witness or otherwise cover the event must follow the instructions as outlined in the advisory. The Public Information Officer and Assistant Director,

Communications will announce a 10-day filing period in which the news media may submit their written requests to witness the execution. Requests must be for the execution at hand, and will not be kept on file. No request will be considered that is received after close of business of the tenth and final day.

- 2) Work with the Assistant Director, Communications to select up to seventeen (17) media witnesses to the execution. Consideration will be given to the broadest cross-section of media format and greatest circulation/viewers.

3. 30 - 7 Days Prior to an Execution:

a. Sanity Review Request:

Attorneys may submit in writing for the Warden's review, any current psychiatric information that they believe may have a bearing on evaluating the sanity of a condemned inmate with a scheduled execution date.

This information will be accepted 30 days prior to a scheduled execution, and up to 7 days prior to the scheduled execution. Information submitted sooner than 30 days preceding the scheduled execution will not be considered by the Warden under this procedure, but will be accepted for consideration by the panel of alienists. The panel of alienists will consider this information in preparation of the 20-day pre-execution sanity report.

The Warden will have available for review all psychiatric information pertaining to the condemned inmate known to San Quentin's psychiatric staff. This information will be reviewed along with all material submitted by the inmate's attorney. Upon reviewing the information, the Warden will determine if there exists a substantial showing of insanity.

The Warden will notify the condemned inmate's attorney in writing of the results of the requested sanity review. Should the Warden, with the assistance of the independent Department of Corrections Psychiatrist, find a substantial showing of insanity, the Warden will notify the District Attorney of Marin County in accordance with Penal Code Section 3701.

The Warden will accept requests for the Warden's review of psychiatric information regarding the inmate's sanity up to 7 days prior to the scheduled execution. The procedures that are put in place by San Quentin the week prior to the execution provide the Warden with current information regarding the inmate's behavior and psychiatric condition. These procedures include more intensified psychiatric staff

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contact with the inmate. In addition, the inmate's behavior is continuously monitored by unit staff for the final 5 days with documentation completed every 15 minutes. Should the inmate display unusual or inappropriate behavior, the Warden will be notified immediately by institutional staff. The Warden will take necessary steps to evaluate any reported changes including utilizing the provisions of Penal Code Section 3701, if deemed appropriate. All referrals to the Marin County District Attorney's office, under the provisions of Penal Code Section 3701, will be reported to the Director of Corrections in writing via the Deputy Director of Institutions.

The Director will notify the Governor's Legal Affairs Secretary in writing of all referrals to the Marin County District Attorney's office under the provisions of Penal Code Section 3701.

4. 10 - 7 Days Prior to an Execution:

a. The Warden will:

- 1) Compile and send a final 7-day report (original documents) to the Director via the Deputy Director, Institutions which will in essence indicate whether or not there has been any change in the inmate's mental condition since the last 20-day report. For execution dates that do not appear to be imminent, the 7-day report will be delivered to the Deputy Director, Institutions Division, 14 days prior to the scheduled execution. For imminent executions, the 7-day report will be delivered 7 days prior to the execution. The Director of Corrections shall forward the 7-day report to the Governor's Legal Affairs Secretary via the Agency Secretary, Youth and Adult Correctional Agency. This report shall be a memorandum updating the formal 20-day report based upon current observations. Intermediate reports may be submitted by the Warden any time there is a change which may have an effect under Section 3700.5 of the Penal Code.
- 2) Review the inmate's selection of witnesses and spiritual advisor(s) as provided by the Associate Warden, Unit III, and notify the inmate in writing of his/her decision to approve or deny any or all witnesses. The requested witnesses/spiritual advisor(s) must meet normal visiting criteria.

b. The Associate Warden, Unit III will:

- 1) Ascertain if the condemned inmate wishes to invite up to five (5) witnesses and two (2) spiritual advisors.

If so, provide the Warden with the names and addresses.

c. The Psychiatrists (Alienists) will:

- 1) Interview and evaluate the inmate in much the same manner as they did for the 20-day report, and submit their findings to the Warden in writing. They shall compare their current evaluations with their previous findings to determine any change in the inmate's mental condition. Their observations must be current (within 10 days preceding preparation of the report) and pertain to the inmate's mental state.

d. The Chaplain will:

- 1) Report the emotional state of the inmate, being especially sensitive to any change. The chaplain's observations will be submitted in writing to the Warden. These observations shall pertain to contacts made within 3 days preceding preparation of the report.

e. The Condemned Row Correctional Counselor II will:

- 1) Report any change in conduct or behavior in writing to the Warden.

f. The Legal Affairs Coordinator will:

- 1) Contact the next of kin or attorney by telephone to advise them that we will be asking their wishes concerning disposition of the inmate's remains.
- 2) If necessary, prepare a letter for the Warden's signature to next of kin requesting their intentions regarding the inmate's remains. Ascertain if they will claim the body. If so, advise the name and location of the contracting mortuary. If they do not intend to claim the body, the Legal Affairs Coordinator will have them so state and will notify the contracting mortuary.

g. The Public Information Officer will:

- 1) Send out written notice to all media representatives selected to be witnesses. Only those reporters, etc. in possession of an authentic original letter signed by the Warden and corresponding photo identification will be admitted to witness the execution.
- 2) Send out written notice to all media representatives selected to cover the execution event. Selection will be made of 125 total persons from legitimate media

outlets. Only those bearing authentic original letters signed by the Warden will be admitted to the institution and the media center.

h. The Lieutenant in Charge of the Chamber will:

- 1) Report in writing to the Warden that the following procedures have been accomplished:
 - (a) Staff assignments on the execution detail are ready.
 - (b) Preliminary chamber area readiness and operational checks have been made. (Needed maintenance work is requested immediately.)
 - (c) Ensure that chamber area has necessary supplies which will consist of both household and personal needs.
 - (d) Ensure that the required clothing will be available.
 - (e) Ensure that the necessary chemicals are not only available, but also properly controlled.

5. 5 Days Prior to Execution:

a. The Associate Warden, Unit III will initiate the following procedure if execution is imminent:

- 1) Direct that the inmate be moved to the designated security housing area of Condemned Row where he will be under 24-hour a day observation of an officer assigned for that purpose. The officer will check the welfare of the inmate at fifteen (15) minute intervals and log each check.

The Warden may order the inmate to be moved to the designated security housing area of Condemned Row where he will be under 24 hour a day observation of an officer assigned for that purpose at any time following receipt of the death warrant when, in the opinion of the Warden, it is necessary to maintain the safety and security of the public, the institution and/or the inmate.

- 2) Direct that all non-legal property belonging to the inmate be removed from his cell and placed under the security of the officer stationed outside the security cell. The inmate will be given the use of items by the officer as he needs them, and then return them to the officer's care.

- 3) In the event of a stay at this juncture, the Associate Warden, Unit III will initiate return of the inmate to his former housing status.
- b. The Condemned Row Correctional Counselor II will initiate the following procedure if execution is imminent:
 - 1) Interview the inmate to ascertain what request if any he may have for a last meal. The Correctional Counselor II will make the meal request known to the Food Manager and determine if Food Service will be able to fulfill the request. This answer will be reported back to the inmate, and either way, preparations made through the Food Manager for a last meal.
 - 2) Interview the inmate to discern any special requests as to the disposition of his property. The inmate will package and label any property to be sent out of the institution. The Correctional Counselor II will maintain an inventory signed receipt of all the packaged property for mailing the first weekday following the execution. In the event of an indefinite stay, the property shall be returned by a signed (inmate) receipt by the Correctional Counselor II.
 - 3) Arrange for the monitoring of all telephone calls made by the inmate via an institutional telephone. Legal calls will not be monitored but will be facilitated by staff. All calls will be logged on the pre-execution activity log. The Correctional Counselor II will ensure that the inmate has 24-hour access to a telephone for attorney contact.
 - 4) Obtain clothing sizes from the inmate and ensure that appropriate clothing is available.
 - 5) Brief the Warden, Chief Deputy Warden, Associate Warden Unit III, and Facility Captain daily as to the inmate's needs, requests, and behavior.
- c. The Chief Deputy Warden will initiate the following procedure if execution is imminent:
 - 1) The Chief Deputy Warden will implement the Execution Security Plan.
- d. The Warden will initiate the following procedure if execution is imminent:
 - 1) Issue a Warden's bulletin to all staff residents advising them of likelihood of a gathering or demonstration at the East Gate.

- e. The Visiting Lieutenant will initiate the following procedure if execution is imminent:
 - 1) Announce to visitors and inmates via posted notice, San Quentin T.V. and any other resource available that visiting will be closed the day preceding the execution as well as the day of the execution.
 - 2) Ensure that the family visiting quarters will be vacant from day 5 through the day of the execution. Prospective visitors, inmates, and housing unit staff will be so informed.
 - 3) Ensure visiting for the condemned inmate is conducted as outlined in the procedure.
 - f. Spiritual Advisors will be allowed access to the inmate as follows:
 - 1) State employed spiritual advisors selected by the inmate will be allowed to perform their spiritual functions at the cell front of the inmate's cell either on Second or Third Watch. The state employed spiritual advisor may visit the inmate in the holding cell of the execution chamber if requested by the condemned inmate.
 - 2) Non-state employed spiritual advisors may visit the inmate utilizing the procedure as outlined in this procedure. Grade B inmates will be on a non-contact basis. Non-state employed spiritual advisors will not be allowed to visit the inmate in the housing unit.
6. 4 Days Prior to an Execution:
- a. The Warden will initiate the following procedures if execution is imminent:
 - 1) Issue a letter to San Quentin Village residents, Marin Rod and Gun Club and the Post Office advising them of any likelihood of a gathering or demonstration at the East Gate.
 - 2) Direct that notices be passed during staff briefings and via the Count Gate television monitor, to inform staff of the East Gate closure on the evening prior to the day of the execution
 - b. The Business Manager II will:
 - 1) Notify all contractors and vendors that we will not be accepting any services or goods from 1800 hours, 2 days prior to the execution through the execution day.

7. 3 Days Prior to an Execution:

- a. The Lieutenant in Charge of the Chamber will initiate the following procedure if execution is imminent:

- 1) Be responsible for the security of the area. A search of all materials that will come into contact with the condemned inmate will be made. All equipment will be in working order and functioning. All chemicals will be under appropriate control to prevent tampering.

The following procedures will be followed without exception:

- (a) The execution chamber area shall be closed to any and all persons not cleared by the Warden. The Lieutenant in Charge of the chamber has authorized access.
- (b) The execution chamber area keys will not be issued to any person other than the Lieutenant in Charge of the Chamber or designee.
- (c) All necessary traffic into the chamber areas will be cleared and directly supervised by the Lieutenant in Charge of the Chamber.
- (d) The chamber area, holding area, and visiting area are cleaned and sanitized daily until the execution is carried out.

8. Two Days Prior to an Execution:

- a. The Lieutenant in Charge of the Chamber will assume the following responsibilities:

- 1) Conduct an equipment check of all materials necessary to perform the execution.
- 2) Check the expiration and/or sterilization dates of all applicable items.
- (a) Outdated items (e.g. Normal Saline bags) shall be replaced immediately.
- (b) Sterilized packs bearing a sterilization date in excess of thirty (30) days shall be replaced or re-sterilized immediately.

9. Day Prior to an Execution:

- a. The Chief Deputy Warden will:

- 1) Place institution on lockdown at the appropriate time commensurate with the day and hour of the scheduled execution.
- b. The Warden and Associate Warden, Unit III will:
- 1) Direct that at the appropriate time commensurate with the day and hour of the scheduled execution, the inmate be rehoused in the death watch cell adjacent to the execution chamber area.
 - 2) In the event the inmate has requested a spiritual advisor not employed by the Department of Corrections, the following procedure will be followed:
 - (a) The spiritual advisor will be permitted to visit with the inmate in the visiting room until 1800 hours if the execution is scheduled for shortly after midnight. Confidential visits in the plexiglass booths are not permitted.
 - (b) After visiting concludes, he/she will be given a completed unclothed body search in the appropriate restroom of the main visiting room.
 - (c) The spiritual advisor will be escorted through the rear search area door past Four Post, where he/she will be afforded the opportunity to use the staff restroom.
 - (d) The spiritual advisor will be permitted to bring the following items into the death watch area:
 - (1) Personal prayer book / Bible
 - (2) Communion pyx
 - (3) Sacramental wafers
 - (4) Other approved religious items

All items will be searched.

 - (e) If the spiritual advisor requests the use of the restroom, he/she will be escorted to Four Post. Another unclothed body search will be conducted before he/she is escorted back into the death watch cell.
 - (f) The spiritual advisor will be permitted drinking water upon request.
 - (g) The spiritual advisor will have no telephone access while in the death watch area.

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(h) At 2315 hours, or 45 minutes prior to the scheduled time of execution, the spiritual advisor will be escorted from the death watch cell area, through the front count gate.

(i) If the spiritual advisor has also been designated as an inmate invited witness, he/she will be escorted to a van until clearance to enter the witness area has been given. If he/she is not going to witness, the van will proceed to the West Gate where he/she will be processed out of the institution.

3) The Warden will be notified prior to any otherwise authorized visitor entering the death watch area.

c. The Lieutenant in Charge of the Chamber will:

- 1) Obtain the lethal injection:
- 2) Establish a death watch on a round-the-clock basis consisting of one (1) Correctional Sergeant and two (2) Correctional Officers.
- 3) The Execution Team will arrive for pre-execution instructions. The Lieutenant in Charge will arrange for accommodations as necessary.

d. The Captain, Central Services will:

- 1) At the appropriate time commensurate with the day and hour of the scheduled execution, establish a support team to assist as needed to maintain the smooth operation of the institution
- 2) At the appropriate time commensurate with the day and hour of the scheduled execution, establish a second support team. This staffing will continue as needed the day of the execution. The support teams shall be in addition to response teams.
- 3) Ensure East Block visiting area, main visiting area, and employees' lounge are cleaned and sanitized.
- 4) At the appropriate time commensurate with the day and hour of the scheduled execution, inspect all areas.

e. The Public Information Officer will:

- 1) Activate the media center at the appropriate time commensurate with the day and hour of the scheduled execution in the In-Service Training hall. The Public Information Officer will activate the bank

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of pay telephones, and otherwise address the needs of media representatives that may be operating out of the center. The assigned staff will release no information or offer any commentary unless specifically authorized by the Public Information Officer. The Public Information Officer will give regular updates to any media gathered, and notify the Assistant Director, Communications of this action.

- 2) Work with the Assistant Director, Communications to prepare a biographical and general information sheet on the inmate for briefing notes for the media, including California Department of Corrections I.D. photo. A copy of this biographical and general information sheet will be sent to the Assistant Director of Communications.
- 3) At the time designated by the Warden, identify the media witnesses and escort them to their waiting area room at In-Service-Training (IST). The Public Information Officer will instruct the media witnesses there will be no cameras, recorders, sketch pads, etc. These items will be deposited at the media center for later retrieval. No such equipment will be allowed in the witness gallery. Pencils and notepads will be provided. The Public Information Officer may utilize the metal detector at the Inspectoscope Gate, or any other search method deemed necessary and reasonable.
- 4) The Warden through the Public Information Officer will designate a cut off time for the media to arrive as outlined in the Execution Security Plan.

f. The Official Witnesses will:

- 2) Meet in the designated area at the designated time for greeting by Warden.

10. Day of an Execution:

a. The Warden will:

- 1) Assure all witnesses are appropriately accommodated.
- 2) Usher the official witnesses to their assembly area and give final instructions as needed.
- 3) Approximately one-half hour before the execution, take his/her position at the execution chamber.

- 4) Direct that the witnesses be escorted into the witness area and take their designated places.
 - 5) At the designated time of the execution, after all witnesses are in their designated places, issue the first of the required four commands:
 - (a) Ready the inmate.
 - (b) Bring the inmate out.
 - (c) Strap the inmate into the injection chair.
 - (d) Place the catheters in each arm and start the saline solution.
 - 6) Once the saline solution is flowing, direct a member of the execution team stationed on the witness area side of the locked door leading to the execution anteroom to read a prepared statement detailing the court order mandating the execution.
 - 7) Order the administration of the lethal injection until inmate is pronounced dead.
 - 8) Upon verification by one of the attending physicians, a member of the execution team will read a prepared statement announcing the death of the inmate.
 - 9) Immediately following the execution, thank witnesses. Arrange for their safe departure from the institution with the Investigations Unit Captain.
 - 10) Approximately 1 hour after the execution, the Warden will issue a statement to the media.
- b. The Associate Warden, Unit III will:
- 1) Approximately 2 hours prior to execution, meet with Warden.
- c. A State Physician will:
- 1) Attend with another staff physician, and by monitoring the heart of the inmate, or by whatever means appropriate, determine and pronounce death.
- d. The Public Information Officer will:
- 1) After receiving the order from the Warden, escort the media witnesses into the witness gallery.
 - 2) Immediately upon Declaration of Death, take note of the exact time and usher the media witnesses directly

to the media center where they will give pool commentary and recount to the other assembled media. The Public Information Officer will give no commentary until after the official statement by the Warden.

- 3) Accompany the Warden to the post execution press conference. Field questions that follow the Warden's statement.
 - 4) As soon as possible after the issuance of the official statement, usher all media out of the prison grounds.
- e. The Administrative Assistant to the Warden will:
- 1) Assist the Public Information Officer in escorting news media into media center.
 - 2) Escort the official and other witnesses into the witness gallery.
 - 3) Assign a Correctional Officer to escort witnesses invited by inmate and/or the inmate's legal team from the West Gate to the designated areas. The correctional officer will remain with these witnesses and assist in escorting to the witness gallery. It is customary that not all members of the legal team actually witness the execution, but are on grounds until the execution has been carried out.

B. WITNESSES TO AN EXECUTION

1. Types of Witnesses:
 - a. Official Witnesses:
Official witnesses as defined in Section 3605 of the California Penal Code, will not have their names made public. Official Witnesses will be escorted into the viewing room first, and take seats at the rail.
 - b. Witnesses and Other Observers (staff, etc.)
Witnesses and observers will not have their names made public. Witnesses will be escorted into the viewing room second, taking their places upon the east risers.
 - c. News Media Witnesses
News media witnesses will be admitted according to Section D - NEWS MEDIA. News media witnesses will not have their names made public, unless they choose to do so. Media witnesses will be escorted into the viewing room third, taking their places upon the north risers.
 - d. Inmate Requested Witnesses

Inmate requested witnesses will be escorted into the viewing room fourth, taking their places upon the south risers.

2. Allocation of Available Space:

The total capacity of the witness area of the execution chamber is fifty (50) persons. The distribution of those present shall be as follows:

Attorney General	1
Staff	4
Official Witnesses	12
Governor's Witnesses	4
Director's Witnesses	3
YACA Witnesses	2
News Media Witnesses	17
Witnesses Requested by Inmate-	
Family and Friends	5
Spiritual Advisors	<u>2</u>
TOTAL	50

3. Request for Witnesses by the Condemned Inmate:

- a. All requests to witness an execution, including the inmate's request to have family or friends present, shall be directed in writing to the Warden. The Warden shall choose those persons who will be allowed to do so and will notify them, in writing, no later than seven (7) days before a scheduled execution, pursuant to Section 3605 of the Penal Code.

4. Selection of News Media Witnesses (maximum 17):

- a. When an execution is scheduled, the Warden will request that the Assistant Director, Communications notify the media and establish a filing period in which to accept media requests to witness the execution. All media requests to witness each execution shall be directed in writing to the Communications Office, Headquarters. All letters of request will be date stamped upon receipt. They will only be considered for the scheduled execution and will not be kept "on file." Requests will only be accepted immediately prior to the date of execution and not after the filing period. Media is defined in Title 15, CCR Section 3000 and DOM subsection 13010.5.
- b. The Assistant Director-Communications shall consult with the Warden and his Public Information Officer and assist them in selection of the members of the news media to witness an execution. All media witnesses must agree to the use of a "pool" method and all members must agree to release information simultaneously to all other news agencies at a press conference held as soon as possible after the execution. The media witnesses will not be permitted

any cameras, tape recorders, or drawing implements, etc., in the witness area. Pencils and notepads will be provided.

5. Procedures for Selecting Victim Family Witnesses:

- a. The highest priority will be given to include victims' family members who request to witness the execution procedure. If a large number of victims exist, the selection criteria shall attempt to include at least one family member per victim.

6. Procedures for Processing Witnesses:

- a. All witnesses need to arrive at the institution's West Gate at the time designated by the Warden. Parking will be in the designated parking area. All witnesses will be processed through the Inspectoscope Gate.

- 1) No blue jeans, i.e., jeans-style blue, black, or gray pants or Levi's.
- 2) No cameras or recording equipment. Pencils and notepads will be furnished to media witnesses.

- b. All witnesses must have a photo I.D.

6. Witnesses Accommodation Prior to Execution:

- a. After processing, witnesses will be escorted to their designated areas until time to move to the execution chamber. At a time announced by the Warden, the witnesses will be escorted to the witness area and directed to their designated places.

7. Witness Accommodation After Execution:

- a. After the announcement of death, the official and other witnesses will be escorted to a designated area. The inmate's witnesses will be transported to their transportation at the West Gate.
- b. The media witnesses will be transported to the media staging area to await the Warden's press conference approximately one hour after a scheduled execution.

D. NEWS MEDIA

1. Responsibility:

The Public Information Officer, under the direction of the Warden, in conjunction with the Assistant Director of Communications, is responsible for coordination of news media personnel pursuant to an execution.

2. Media Access to the Institution:

Members of legitimate media, as defined in Title 15, CCR Section 3000 and DOM subsection 13010.5, will be allowed on San Quentin grounds on the day and time specified by the Warden. Requests must be made to the Assistant Director, Communications, in writing. A maximum of 125 non-witness news media personnel will be permitted to remain in the IST hall during and after the execution to await the Warden's post execution press conference. News media representatives who receive a letter of authorization from the Warden will be admitted to the institution, provided they are properly credentialed and attired.

3. Coordination of Non-witness News Media:

- a. All non-witness media members need to arrive at the institution's West Gate on the day and time specified by the Warden. Parking will be in the designated parking area. Media broadcast vans will be admitted to the institution grounds on a space-available basis and prior written approval of the Warden. Requests for such accommodations should be made when requesting to cover the event. All media members must have a photo I.D. and a letter signed by the Assistant Director of Communications.

The media members will be admitted and processed at the West Gate and escorted to the IST Building by the Administrative Assistant.

- b. After the execution, the media witnesses will join the non-witness media as soon as possible at the IST Building for the media press conference, where they will relate what they witnessed to the media non-witnesses. The Warden's press conference will follow at about one hour after an execution. At the conclusion of the Warden's press conference, all media personnel will be escorted to the West Gate, including broadcast vans.

4. Condition for Admittance of News Media Representatives:

- a. No "blue jeans" are allowed. "Blue jeans" are defined as any denim trousers colored any shade of blue, black, or gray.
- b. Cameras (still and video), recording equipment and other equipment will be allowed, subject to search.
- c. All media broadcast vans will be parked in the parking area adjacent to the IST building. Cameras and recording equipment will only be allowed in the IST Building and in the parking area.
- d. Satellite link-up vans may be allowed into the lower staff parking lot next to the visiting lot by prior arrangement.

5. Interviews with Condemned Inmates:

All interviews will be consistent with departmental policy.

6. Information Releases:

- a. The names of the 12 official witness will not be released.
- b. The names of execution team members will not be released, nor will they be available for interviews or photographs.
- c. The Public Information Officer, at the direction of the Warden and Assistant Director, Communications, will be responsible for all news releases prior to, during and after an execution and for the developing of all necessary press and information releases.
- d. The Warden, with the assistance of the Assistant Director, Communications and Public Information Officer, will hold a press conference approximately one hour after a scheduled execution. No other interview will be given by the Warden after the news conference is completed.

E. EXECUTION CHAMBER OPERATION

1. Personnel:

a. Responsibilities:

- 1) WARDEN: The Warden shall have the overall responsibility for the execution and will work and train closely with all personnel responsible for all phases of the procedure. The Warden shall select the execution team.
- 2) CHIEF DEPUTY WARDEN: The Chief Deputy Warden shall be responsible for the security of the institution and will be in command of the Emergency Operations Center (EOC). The Chief Deputy Warden will be in command of SERT/NMT and other special security forces.
- 3) ASSOCIATE WARDEN, UNIT III: The Associate Warden, Unit III shall accompany the Warden on the day of the scheduled execution into the chamber anteroom.
- 4) CAPTAIN CENTRAL OPERATIONS: The Captain, Central Operations shall coordinate institutional operations. Responsible for sanitation of visiting areas, lounge areas, and entry road areas.

- 5) PUBLIC INFORMATION OFFICER: Public Information Officer shall be responsible for all news releases prior to, during, and after an execution.
- 6) ADMINISTRATIVE ASSISTANT: Administrative Assistant is responsible for escorting the non-witness media members to the In-Service-Training building and providing security for the special media vans.
- 7) LIEUTENANT IN CHARGE OF THE EXECUTION CHAMBER: The Lieutenant in Charge of the execution chamber is responsible for the direct supervision of the execution team, as well as functioning as a liaison with the Warden. He/she is responsible for the necessary security integrity of the chamber areas and related functions. Responsible for the sanitation of chamber and adjacent areas.
- 8) RECORDER: A designated team member shall keep accurate records of time that each phase of the execution takes place.
- 9) THE DEATH WATCH CELL SERGEANT AND OFFICERS: The Death Watch Cell Sergeant and officers assigned to the overnight detail are responsible for the security of the condemned inmate(s) throughout the night until execution time, under the direction of the Lieutenant in Charge of the Chamber. If the condemned inmate is female, one of the officers shall be female.
- 10) WITNESS AREA OFFICERS: The witness area officers shall station themselves in the witness area during an execution
- 11) OTHER EXECUTION TEAM OFFICERS: The other execution team officers shall perform duties as assigned by the Lieutenant in Charge of the Chamber.

2. Facility:

a. Description of Execution Chamber:

- 1) The lethal execution chamber for the State of California is a self-contained unit located at the California State Prison at San Quentin. The chamber area consists of the witness area, two (2) holding cells, the chemical room, kitchen/officers' area, anteroom and execution chamber.
- 2) The witness area is accessible directly by a door located between the main visiting room and the East Block visiting room. This area can be isolated from

the rest of the chamber. Visibility during an execution is through five (5) windows. Capacity of this area is fifty (50) persons.

- 3) The two (2) holding cells each contain a toilet and sufficient room for a mattress.
- 4) The chemical room contains storage cabinets, work bench, and two (2) chemical mixing pots as well as pipe work and valves. This room is utilized during executions by lethal gas.
- 5) The kitchen/officers' area has a small sink, cabinet and counter area as well as a resting area for staff members.
- 6) The anteroom contains several valves and the chamber immersion lever, used during execution by lethal gas. Access to the witness area, or to North Block is through two (2) separate solid iron doors. Also in this area are direct telephone line utilized by the State Supreme Court and Attorney General's office.

3. Execution Chamber Maintenance:

A constant state of readiness and the proper safe operation of the execution chamber requires periodic inspection and maintenance of the chamber throughout the year.

The door to the execution chamber is to remain locked in the open position when not in use or testing.

To prevent corrosion, there is a natural draft to exhaust stack which keeps the chamber dry and free of any drain odor.

Total body fluid precautions will be instituted for infection control.

4. Lethal Injection Execution:

a. Chemicals needed for execution:

- 1) Sodium Pentothal, 5.0 Gm, plus one unopened backup.
- 2) Normal Saline, 20 cc.
- 3) Pancuronium Bromide (Pavulon), 50 mgm per 50 cc.
Total injection; 100 cc/100 mgm.,
- 4) Potassium Chloride, 50 milequiv. per 50 cc.

Total injection; 100 cc/100 mgm.

b. Equipment and Materials:

- 1) One (1) Sodium Pentothal, 5 gm., w/diluent
- 2) Pancuronium Bromide (Pavulon)
- 3) Potassium Chloride
- 4) Ten (10) Syringes, 50 cc
- 5) Ten (10) Syringes, 20 cc
- 6) Ten (10) Needles 18 Ga., 1"
- 7) Five (5) Angiocaths, 20 Ga., 1"
- 8) Five (5) Angiocaths, 18 Ga., 1"
- 9) Five (5) Angiocaths, 16 Ga., 1 3/4"
- 10) Four (4) Normal Saline, IV bags, 1000 cc
- 11) Twelve (12) Extension sets, 72" long
- 12) One (1) Box alcohol preps
- 13) Four (4) Rolls adhesive tape, 1"
- 14) Four (4) Rolls adhesive tape, 2"
- 15) Four (4) Rolls adhesive tape, 3"
- 16) One (1) Pair scissors, Bandage, pr.
- 17) Six (6) Tourniquets
- 18) Box gloves, surgical, Size 7, sterile
- 19) Box gloves, surgical, Size 9, sterile
- 20) Box surgical masks
- 21) Three (3) Flashlights, w/batteries
- 22) Ten (10) Chux
- 23) Two (2) Arm Boards
- 24) Six (6) 3 Way Stopcocks
- 25) Restraint Gear
Department approved handcuffs and leg irons.

- 26) Cardiac Monitor
Two (2) sets
 - 27) Wall Clocks
Two (2)
 - 28) Cleaning Supplies
As required for ongoing maintenance of chamber and onsite facilities.
 - 29) Light Bulbs – assorted wattage
 - 30) Hand soap
 - 31) Paper Towels
 - 32) Toilet Paper
 - 33) Mop-up Towels
 - 34) Visiting Room Buffer
Used on regular basis to wax floors, etc.
- c. Inmate(s) Needs on Overnight Status:
- 1) Bed Mattress
 - 2) Blanket
 - 3) Pillow
 - 4) Electric Heater and extension cord
 - 5) AM/FM Radio
 - 6) Television

7) Inmate Clothing (3 sets)

State issue trousers
State issue undershorts
State issue undershirt
State issue socks
State issue blue shirt

In the event the condemned is a female, the clothing consists of brassiere, panties, and blue dress.

Female clothing will be provided by the Central California Women's Facility (and delivered with the condemned female 48 hours prior to actual execution date.)

8) Towels

9) Chess and Checkers set

10) Coffee and/or Approved Drinks (non-alcoholic)

11) Last Dinner Meal (as reasonable as possible)

ASCERTAIN DISPOSITION OF PERSONAL PROPERTY FROM CONDEMNED INMATE AFTER HIS/HER PLACEMENT IN OVERNIGHT CELL (DONATION, MAIL TO RELATIVE, ETC.)

d. Procedures:

1) Two (2) Weeks Prior to Scheduled Execution:

- (a) The Lieutenant in Charge of the Chamber will notify the Warden that the following procedures have been accomplished:

Specific staff assignments to the execution detail have been made.

Preliminary chamber area readiness and operational testing procedures have been made. Necessary maintenance work will be performed in the presence of the Lieutenant in Charge of the Chamber or his/her designate (Chamber Operator/Chemical Operator.)

Ensure the chamber areas have full complements of necessary household and personal needs of the condemned inmate and all required clothing is available.

Ensure the direct telephone lines utilized by the State Supreme Court and the Attorney General's office are on-line and working.

Inventory all chemicals and equipment necessary in chamber operation are available and under proper storage.

2) One (1) Week Prior to Scheduled Execution:

- (a) The Lieutenant in Charge of the Chamber will inspect the chamber areas for the following:

Ensure all maintenance work requested has been completed and the chamber is ready.

Preliminary and operational tests are again performed to ensure readiness of chamber areas. The prison Correctional Plant Manager (CPM), and/or Maintenance Supervisor (Execution Team Liaison) will be present during this operational check of the chamber.

Ascertain all necessary clothing, personal items, overnight detail equipment, etc., are properly available and operational. The Lieutenant in Charge of the Chamber will notify the Warden of this inspection. At this point, all equipment should be operational and functioning properly.

All necessary supplies should be in the chamber area or where designated and ready for use.

The entire area should be in a high state of cleanliness and ready for outside witnesses.

3) Three (3) Days Prior to Scheduled Execution:

- (a) The following procedure will be strictly adhered to without exception:

The execution chamber area will be closed to any and all persons not specifically cleared by the Warden. The Lieutenant in Charge of the Chamber and necessary team members are authorized access.

All traffic into the chamber areas will be approved by the Lieutenant in Charge of the Chamber, who will directly supervise necessary traffic into the area.

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The Lieutenant in Charge of the Chamber will conduct the following pre-execution inventory and equipment check:

- (1) Members of the injection team shall conduct an equipment check of all materials necessary to perform the execution.
- (2) The inventory shall be conducted not less than twenty-four (24) hours, and not more than ninety-six (96) hours, before the scheduled execution.
- (3) Expiration and/or sterilization dates of all applicable items shall be checked on each individual item.
 - (a) Outdated items (e.g. Normal Saline bags) shall be replaced immediately.
 - (b) Sterilized packs bearing a sterilization date in excess of thirty (30) days shall be replaced or re-sterilized immediately.

At this time, the Lieutenant in Charge will be responsible for the security of the chamber. A search of all materials that will come into contact with the condemned inmate(s) will be made by the Execution Team. All equipment will be in working order and functioning properly.

All chemicals will be stored under appropriate controls to prevent tampering.

NOTE: In the event the condemned inmate is female, she will be transported from the Central California Women's Facility not earlier than three (3) days prior to the scheduled execution date. The condemned female will be placed upon arrival in the overnight cell and necessary coverage and supervision of the condemned inmate as outlined in this procedure for male inmates will be arranged by the Lieutenant in Charge of the Chamber.

4) **One (1) Day Prior to Scheduled Execution:**

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The Execution Team members as designated by the Lieutenant in Charge of the Chamber will perform the following:

(a) Obtaining Drugs:

- (1) During the afternoon immediately preceding an execution by lethal injection, a member of the injection team shall proceed to the pharmacy to obtain the necessary agents (drugs) for the procedure.
- (2) When the drugs have been issued, and quantities verified, they shall be placed in the Lethal Injection Drug Box, and the box locked.
- (3) A member of the injection team shall maintain personal, physical custody of the locked drug box until such time as it is opened for use, or for return if not used.

(b) Chamber Kitchen:

Check linen - includes officer cot and sheets, pillow, pillowcase and six (6) towels. Contact the laundry if additional supplies are needed.

Contact the Food Manager for foodstuffs; fruit, coffee, sugar, milk, and ice.

(c) Overnight Cells:

Thoroughly search cells, depending on number of executions set for the next day.

Obtain overnight cell furnishings. For each cell to be used, obtain one (1) mattress, one (1) blanket, and one (1) pillow from the storage closet located in the witness room.

Very thoroughly search each item. Place in overnight cell, spreading the blanket over the mattress. Place the pillow at the head of the mattress. LOCK THE CELL DOORS.

(d) At the appropriate time commensurate with the day and time of the execution:

- (1) Lieutenant in Charge of the chamber will contact the Warden for last minute information.

(e) **At the appropriate time commensurate with the day and time of the scheduled execution:**

- (1) The appropriate number of supervisorial and custody staff as determined by the Associate Warden of Unit III will arrive at the condemned row office. One of the detail officers searches the clothing to be worn by the condemned inmate. The unit lieutenant makes the necessary notation in the condemned row log book. The escort team then enters the condemned tier and proceeds to the cell of the condemned inmate. While in the cell, the inmate is given an unclothed body search and then placed in mechanical restraints. The inmate, wearing his underclothing, is escorted to the holding cell where he is retained pending an unclothed body search which includes a metal detector scan.
- (2) Following this, he is given a complete new outfit of clothing that was previously searched by the officer. This clothing consists of undershirt, shorts, socks, blue jeans, blue shirt, and canvas slippers. All items of clothing are regulation for the institution. After the inmate is clothed, he is placed in restraint equipment. He is then escorted to the elevator via the condemned unit door, by the aforementioned officers, then to the lower floor of the cell block and to the door leading to the overnight cell area. A lieutenant, as per previous arrangements, is stationed on the opposite side of the door in the overnight cell area, with the necessary key which he passes to the officer through the door aperture. The door is unlocked and the officers escort the condemned inmate into one of the overnight cells, and the restraint equipment is removed.
- (3) One officer will be posted at the door leading to the overnight cell area after the condemned inmate is placed in the

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cell. This position will be posted during the third watch and first watch preceding the execution.

- (4) Equipment required for this position is one (1) handheld radio and key ring.
- (5) Commencing immediately upon posting, the officer will make a visual security check through the door aperture leading to the overnight cell and will continue the security checks every 30 minutes.
- (6) The Lieutenant in Charge of the chamber asks the inmate who his spiritual advisor is, then informs the condemned inmate of the time his dinner will be served.
- (7) The Lieutenant informs the inmate that he will return to see him later in the evening, or sooner if the inmate desires. At this point, the inmate is introduced to the sergeant and two (2) officers who will be with him throughout the night. All staff, except the overnight detail, leave the chamber area, and the Lieutenant in Charge of the chamber reports directly to the Warden.

(f) **At the appropriate time commensurate with the day and time of the scheduled execution:**

- (1) Dinner is brought to the area by a sergeant and the supervising cook. The dinner normally is the meal requested by the inmate insofar as is reasonable and possible to obtain. Coffee is available throughout the night.

(g) **At the appropriate time commensurate with the day and time of the scheduled execution:**

- (1) The inmate is usually visited by the spiritual advisor of his choice and the Warden. The Lieutenant in Charge of the chamber returns during the evening to check with the overnight sergeant and officers and stays as

required. He remains on duty through the execution. All visitors in the overnight cell area must be approved by the Warden.

- (2) The condemned inmate is allowed reasonable last requests. Normally, these requests include the following:
 - * Special items of food and soft drinks;
 - * Special programs on the radio or television set;
 - * Funds on the books be transferred as he might designate;
 - * He will be allowed to walk to the chamber without assistance;
 - * He will be allowed to send out last letters;
 - * The reporters and newspapers not mention his family, etc.
- (3) Requests, other than normally routine, are processed through the Warden or the Officer of the Day.
- (4) Routine requests are handled by the Lieutenant in Charge of the chamber or the respective Watch Commander on duty.
- (5) The Watch Commander will make routine checks with the overnight officers during their respective shifts.
- (6) The telephone located in the chamber kitchenette is restricted to the Warden, Lieutenant in Charge of the chamber, the Administrative Officer of the Day, and the Watch Commander on duty.

5) **DAY OF SCHEDULED EXECUTION:**

(a) **Approximately 3 hours prior to the execution:**

- (1) The state employee spiritual advisor may arrive at the overnight cell and, if requested to do so by the condemned

inmate, remains until after the execution. On other occasions, he may give communion and then return 1 hour prior to the execution to remain until after the execution.

(b) **Approximately 2 hours prior to the execution, the following procedure will be followed:**

- (1) Members of the injection team shall enter the injection room and immediately reinventory the supplies and equipment to insure that all is in readiness, and if applicable, obtain replacement items from the pharmacy.

(c) **Approximately 1 hour prior to execution, the following procedure will be followed:**

The IV set-up will proceed as follows:

- (1) The connecting needle of Administration Set shall be inserted into outlet of the bag of Normal Saline IV solution.
- (2) The on-off clamp located between the "Y" injection site and the needle adapter shall be removed and discarded. The flow of solution shall be controlled by the Flo-Trol clamp located above the "Y" site.
 - (a) The lip of the neoprene diaphragm on the "Y" injection site shall be rolled back so that it can easily be removed for insertion of syringe tips instead of a needle.
 - (b) A 72-inch Extension Set shall be connected to the needle adapter of the Administration Set.

NOTE: For the set-up for administration into the distal arm, a second Extension Set shall be required due to the additional distance.

- (3) An Angiocath (no smaller than 20 Ga. X 2") shall be connected to the needle adapter of the Extension Set. Optimal

injection flow may be achieved with a 14 Ga. or 16 Ga. Angiocath, if the veins will permit the use of the larger size.

- (4) The tubing shall be cleared of air and the Angiocath recovered. The set-up is ready for use.
- (5) Steps 1 through 6 shall be repeated for the second set-up.
- (6) The syringes containing the drugs shall be prepared and loaded in the following order:
 - (a) Two 35-cc syringes, each containing 20 cc of sterile Normal Saline. Label syringes "NS".
 - (b) Three 50-cc syringes, each containing 50 mEq of Potassium Chloride in 50 cc. Label syringes "3".
 - (c) Three 50-cc syringes, each containing 50 mgm of Pancuronium Bromide in 50 cc. Label syringes "2".
 - (d) One 35-cc syringe containing 5.0 Grams of Sodium Pentothal. (Kit contents to be dissolved in 20-25 cc of the accompanying diluent to attain complete, clear suspension.) The Sodium Pentothal, being a Federally controlled drug, shall be prepared last, when it appears that it shall actually be used. Label syringe "1".
- (7) A pre-medication is available if requested by the inmate. Valium, or its equivalent, a skeletal relaxant, will be administered if requested by the inmate and approved by the Health Care Manager.

It is noted that three syringes of Pavulon and three of Potassium Chloride are prepared, even though the injection procedure only calls

for two of each. The extra syringes are to be prepared as "stand-bys", in the event one of the others is dropped in handling during the injection procedure. This will take place prior to moving the inmate into the execution chamber.

Chamber operator calls outside telephone operator for time check and sets the clock. Takes position on right side of chamber door. Opens chamber door upon Warden's signal to do so.

(d) **Approximately 45 minutes prior to execution, the following procedure will be followed:**

- (1) The Warden and two (2) physicians arrive at the execution chamber via the outside entrance. The Warden talks briefly with the condemned inmate.
- (2) The condemned inmate remains in the cell, accompanied by the spiritual advisor, until signaled by the Warden that the appointed time has arrived.

(e) **Approximately 10 minutes prior to execution, the following procedure will be followed:**

- (1) The Warden orders that the witnesses be brought into the witness area and take their designated places.
- (2) Escorting officers bring in the witnesses and then leave the area, to wait outside until after the execution when they will again escort the witnesses to their designated areas.

(f) **When the appointed time for the execution has arrived and the signal to commence has been given by the Warden:**

- (1) The inmate is moved into the execution chamber and secured onto the table. The heart monitor equipment is then connected to the monitor. The physician will verify the heart beat registers on the monitor.

- (2) The following execution procedure is started:

The angiocath shall be inserted into a usable vein by a person qualified, trained, or otherwise authorized by law to initiate such a procedure. The flow of **Normal Saline** shall be started and administered at a slow rate of flow.

The above procedure shall be repeated on a secondary location on the inmate. This line shall be held in reserve as a contingency line in case of a malfunction or blockage in the first line.

NOTE: At this point, the administration sets shall be running at a slow rate of flow, and ready for the injection of syringes containing the injection agents. Observation of both set-ups to insure that the rate of flow is uninterrupted shall be maintained. **NO FURTHER ACTION** shall be taken until the pre-arranged signal to start the injection of lethal agents is given the Warden.

After the IV is started, injection team members vacate the chamber.

- (3) All officers vacate the chamber, the door is closed by the chamber operator and sealed by the Lieutenant.
- (4) The chamber operator then turns on the exhaust fan.
- (5) Total anonymity of the injection team members in the injection room shall be maintained. At **NO TIME** shall they be addressed by name, or asked anything that would require an oral response. The members of the injection team shall remove all jewelry and wear long sleeve shirts to cover any identifiable marks, tattoos, or scars.

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- (6) The chamber operator shall report or signal to the Warden that everything is ready. At the verbal command of the Warden, the execution will begin by administering the lethal agents which will continue by intravenous infusion until the inmate is pronounced dead by the physician. During this period, the prison authorities and the recorder will observe and record as necessary. The physician should advise the Warden when the prisoner has expired and the Warden should instruct the recorders to communicate the expiration of the inmate to the witnesses in the witness room via the port in the anteroom door.

(g) **WHEN THE SIGNAL TO PROCEED IS GIVEN BY THE WARDEN:**

(METHOD: Using the "Y" injection tubes on IV sets)

- (1) The flow of the Normal Saline into the left arm shall be cut off utilizing the Flo-Control clamp.
- (2) The neoprene diaphragm ("plug") shall be removed from the "Y" injection tube.
- (3) The tip of Syringe #1 (Sodium Pentothal) shall be inserted into the "Y" injection tube and the injection shall commence. A steady even flow of the injection shall be maintained with only a minimum amount of force applied to the syringe plunger. When the entire contents of the syringe have been injected;
- (4) Syringe #1 shall be removed from the injection tube. A syringe of Normal Saline (marked "NS") shall be inserted and the entire contents injected to flush the line. Then;
- (5) The "NS" syringe shall be removed and one of the #2 syringes (Pavulon) shall be inserted. The entire contents shall be injected with slow, even pressure on the syringe plunger.

CAUTION: If all of the Sodium Pentothal has not been flushed from the line, there is a chance of flocculation forming when coming in contact with the Pavulon, which will block the flow of fluid through the Angiocath. If this should happen, shift over to the contingency line running to the right arm. When the contents of the first #2 syringe has been injected, repeat with the second #2 syringe. When both syringes have been injected;

- (6) The second "NS" syringe shall be inserted and the entire contents shall be injected to flush the line. Then;
- (7) The first #3 syringe (KCl) shall be inserted and the entire contents shall be injected. The second #3 syringe shall be repeated or until death has been pronounced by the physician.
- (8) Upon completion of the injections, or at such earlier time as may be appropriate, the physician shall examine the inmate to pronounce death. The witness curtain will be closed after the inmate is pronounced dead. After the witnesses have been removed, both IV lines from the veins shall be removed and the tubing shall be passed through the opening into the execution chamber.

ALTERNATIVE (g)

WHEN THE SIGNAL TO PROCEED IS GIVEN BY THE WARDEN:

(METHOD: Using the stop-cock manifold. Manipulation of the stop-cock stops one flow, allowing another to start)

- (1) The Luer Lock tip of Syringe #1 (Sodium Pentothal) shall be locked on to the stopcock, the stopcock manipulated, the injection shall commence. A steady even flow of the injection shall be maintained with only a minimum amount of force applied to the syringe plunger. When the entire

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contents of the syringe have been injected;

- (2) The stop cock is manipulated allowing the Normal Saline (NS) to continue to flow and syringe #1 is removed from the cock.
- (3) A syringe of Normal Saline (marked "NS") shall be locked on, the stopcock manipulated, and the entire contents injected to flush the line. Then; after stopcock manipulation;
- (4) The "NS" syringe shall be removed and one of the #2 syringes (Pavulon) shall be locked on. After stopcock manipulation, the entire contents shall be injected with slow, even pressure on the syringe plunger. Manipulate the stopcock, repeat with the second #2 syringe. When both syringes have been injected;

CAUTION: If all of the Sodium Pentothal has not been flushed from the line, there is a chance of flocculation forming when coming in contact with the Pavulon, which will block the flow of fluid through the Angiocath. If this should happen, shift over to the contingency line running to the right arm.

- (5) After stopcock manipulation, the second "NS" syringe shall be locked on, the stopcock manipulated, and the entire contents shall be injected to flush the line. Then, after stopcock manipulation;
- (6) The first #3 syringe (KCl) shall be locked on, the stopcock manipulated, and the entire contents injected. Stop cock manipulation, the second #3 syringe shall be repeated or until death has been pronounced by the physician.
- (7) Upon completion of the injections, or at such earlier time as may be appropriate, the physician shall examine the inmate to pronounce death. After the announcement of

execution, the witnesses will be escorted from the chamber.

6) Post Execution Procedure:

Under the supervision of the Lieutenant in Charge of the chamber, the body shall be removed with care and dignity and placed in a body bag. The body bag shall remain in the chamber area pending removal as pre-arranged with San Quentin's contract mortuary.

The chamber should then be cleaned thoroughly. Between uses, the chamber door and the air intake manifold valve and the exhaust chamber should all be left in accordance with separate instructions for care of same.

Any unused drugs or supplies will be returned to the pharmacy.

S. W. ORNOSKI
Warden (A)

Approved/Disapproved

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Attorneys For Plaintiff MICHAEL ANGELO MORALES

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ANGELO MORALES,

Plaintiff,

v.

RODERICK Q. HICKMAN, Secretary of the
California Department of Corrections; STEVEN
ORNOSKI, Warden, San Quentin State Prison,
San Quentin, CA; and DOES 1-50,

Defendants.

) Case No.

) **DECLARATION OF CHARLES E.
PATTERSON**

Charles E. Patterson, under penalty of perjury, both deposes and states as follows:

1. I am an attorney in California and work at the law firm of Morrison & Foerster in Los Angeles. I was one of the attorneys who represented Manuel Babbitt, a death row prisoner in California, and witnessed his execution on May 4, 1999.

2. When I first observed Manny in the execution chamber, he had already been strapped to the gurney, and the IVs inserted. He seemed calm and relaxed. During this execution, the witnesses were not allowed to view the execution team inserting the intravenous lines into the prisoner, so I do not know how long that took or whether there were any difficulties.

3. While Manny was on the execution table, his eyes closed and he took a couple of deep breaths. About 3 or 4 minutes later, he had a sudden and extreme convulsion. It lasted at least a few seconds. It seemed as if he was going to break all the restraints when this happened. The other witnesses in the room were as stunned as I was when this happened, and I recall seeing some mention of this in the news accounts of the execution.

4. After the sudden convulsion, Manny settled back down and eventually was pronounced dead. I do not know how long this took as I was not allowed to wear a watch during the execution.

I declare under penalty of perjury under the laws of the state of California and the United States of America that the foregoing is true and correct. Executed this ^{17th} day of January, 2006 in Los Angeles, California.

By: 

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Case No.

**DECLARATION OF DR. MARK
HEATH**

1 Dr. Mark Heath, under penalty of perjury, both deposes and states as follows:

2 1. I am an Assistant Professor of Clinical Anesthesiology at Columbia University in New
3 York City. I received my Medical Doctorate degree from the University of North Carolina at Chapel
4 Hill in 1986 and completed residency and fellowship training in Anesthesiology in 1992 at Columbia
5 University Medical Center. I am Board Certified in Anesthesiology, and am licensed to practice
6 Medicine in New York State. My work consists of approximately equal parts of performing clinical
7 anesthesiology, teaching residents, fellows and medical students, and managing a neuroscience
8 laboratory. As a result of my training and research I am familiar and proficient with the use and
9 pharmacology of the chemicals used to perform lethal injection. I am qualified to do animal research
10 at Columbia University and am familiar with the American Veterinary Medical Association's
11 guidelines.
12

13 2. Over the past several years, as a result of concerns about the mechanics of lethal
14 injection as practiced in the United States, I have performed many hundreds of hours of research into
15 the techniques that are used during this procedure. I have testified as an expert medical witness in
16 courts in Maryland, Georgia, Tennessee, Kentucky, Virginia, and Louisiana in the following actions:
17 *Baker v. Saar*, No. WDQ-05-3207 (D. Md.); *Reid v. Johnson*, No. 3:03cv1039 (E.D. Va.);
18 *Abdur'Rahman v. Bredesen*, No. 02-2236-III (Davidson County Chancery Ct., Tenn.); *State v.*
19 *Michael Wayne Nance*, 95-B-2461-4 (Ga. Superior Ct.); *Ralph Baze & Thomas Bowling v. Rees*, 04-
20 CI-01094 (Franklin County Circuit Ct., Ky.), and before state district court judge Ramona Emanuel
21 in Shreveport, Louisiana in February 2003. I have filed affidavits that have been reviewed by courts
22 in the above states and also in California, Pennsylvania, New York, Alabama, North Carolina, South
23 Carolina, Ohio, Oklahoma, Texas, Missouri, and by the United States Supreme Court.
24

25 3. During court proceedings, I have heard testimony from prison wardens who are
26 responsible for conducting executions by lethal injection. I have testified before the Nebraska Senate
27 Judiciary Committee regarding proposed legislation to adopt lethal injection. I have testified before
28

1 the Pennsylvania Senate Judiciary Committee regarding proposed legislation to prohibit the use of
2 pancuronium and the other neuromuscular blockers in Pennsylvania's lethal injection protocol. My
3 research regarding lethal injection has involved both extensive conversations with recognized experts
4 in the field of lethal injection, toxicology, and forensic pathology and the exchange of personal
5 correspondence with the individuals responsible for introducing lethal injection as a method of
6 execution in Oklahoma (the first state to formulate the procedure) and in the United States. I have
7 also appeared as an expert before this Court, by way of declaration, in the case of Kevin Cooper,
8 which was first heard in this Court approximately two years ago, and in the case of Donald J.
9 Beardslee which was first heard approximately one year ago.

11 4. My qualifications are further detailed in my curriculum vitae, a copy of which is
12 attached hereto as Exhibit 1 and incorporated by reference as if fully rewritten herein.

13 5. I have been asked by counsel for Michael Angelo Morales to review the procedures
14 concerning lethal injection currently in place in California to determine the likelihood that those
15 lethal injection procedures create medically unacceptable risks of inflicting excruciating pain and
16 suffering on inmates while the lethal injection is administered. I hold all opinions expressed in this
17 Declaration to a reasonable degree of medical certainty, except as specifically noted at the end of
18 paragraph 35, where I make a speculative comment.

19 6. I have reviewed what the California Attorney General has identified as "a complete
20 copy of the redacted version of San Quentin Operational Procedure No. 770," bearing a revised date
21 of June 13, 2003 ("Procedure No. 770"), which is attached as Exhibit A to Mr. Morales's Motion for
22 Temporary Restraining Order.

23 7. In addition, I have reviewed the execution logs for Donald Beardslee, Keith Daniel
24 Williams, William Bonin, Jaturun Siripongs, and Manuel Babbit (attached hereto as Exhibit 2). I
25 have also reviewed the Declaration of Margo Rocconi, Esq., who witnessed the execution at San
26 Quentin of Stephen Anderson. That Declaration is attached hereto as Exhibit 3. I have reviewed the
27 Declaration of Dr. Mark Heath
28

1 exhibits contained in the case of *Kevin Cooper v. Woodford*, No. C 04 436 JF, including the February
2 3, 2004 Declaration of Dr. Mark Dershwitz, attached hereto as Exhibit 4. I have also reviewed the
3 materials that were submitted in connection with *Beardslee v. Woodford*, No. 5:04-cv-5381 (JF). I
4 have also reviewed 16 Cal. Code Regs. § 2039, which pertains to the training for those performing
5 euthanasia on animals, as well as statutes pertaining to euthanasia of animals from the states of:
6 Florida, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, Oklahoma, Tennessee,
7 Texas, Connecticut, Delaware, Illinois, Kansas, Kentucky, Louisiana, Missouri, Rhode Island and
8 South Carolina. I have also reviewed the 2000 Report of the Panel on Euthanasia of the American
9 Veterinary Medical Association, attached hereto as Exhibit 5, the American Society of
10 Anesthesiologist's Practice Advisory for Intraoperative Awareness and Brain Function Monitoring,
11 attached hereto as Exhibit 6.

12
13 8. Based upon my review of this material and my knowledge of and experience in the
14 field of anesthesiology, I have formed several conclusions with respect to the protocol of the
15 California Department of Corrections ("CDC") for carrying out lethal injections. These conclusions
16 arise both from the details disclosed in the materials I have reviewed and from medically relevant,
17 logical inferences drawn from the omission of details in those materials (e.g., details regarding the
18 training of the personnel involved; details of all of the medical equipment used; and details of the
19 precise methods by which the personnel involved use the equipment to carry out an execution by
20 lethal injection).

21
22 **A. CDC's Lethal Injection Protocol**

23 9. CDC's lethal injection protocol calls for the administration of 5 grams of sodium
24 thiopental, 100 milligrams of pancuronium bromide and 100 milligrams of potassium chloride.
25 Broadly speaking, the sodium thiopental is intended to serve as an anesthetic, rendering the inmate
26 unconscious for the duration of the execution. Five grams of sodium thiopental is a massive, and
27 potentially lethal, dose. The pancuronium bromide paralyzes the inmate's voluntary muscles,
28

1 including those of his chest and diaphragm. Pancuronium is not an anesthetic or sedative drug, and it
2 does not affect consciousness. Potassium chloride is a salt solution that, when administered in high
3 concentrations, induces cardiac arrest.

4 10. Although the successful delivery into the circulation of 5 grams of sodium thiopental
5 and 100 milligrams of pancuronium into the circulation would be lethal, it is important to understand
6 that the lethality of sodium thiopental and pancuronium is due to respiratory arrest, which takes
7 several minutes to ensue and does not typically occur prior to the administration of potassium. In the
8 execution sequence, before death is caused by respiratory arrest from sodium thiopental and
9 pancuronium, death is caused by cardiac arrest caused by potassium. I base this opinion, that the
10 potassium and not the pancuronium or sodium thiopental is responsible for the death of prisoners
11 during lethal injection, on the following:
12

13 A) Review of records from EKGs from lethal injection procedures conducted in
14 other states, including California. During lethal injection, cardiac activity consistent with
15 generating perfusion persists through the administration of sodium thiopental and
16 pancuronium and only stops after potassium has been administered. The relatively sudden
17 cessation of organized EKG activity is not consistent with a cessation of circulation due to
18 administration of sodium thiopental and/or pancuronium and is consistent with cessation of
19 circulation after the administration of a large dose of potassium chloride.
20

21 B) Statements by Dr. Mark Dershwitz. Dr. Mark Dershwitz, who has often
22 served as an expert for various States in lethal injection challenges, has in his affidavits made
23 statements such as, "...during an execution by lethal injection, circulation is slowed
24 immediately by the administration of sodium thiopental, and circulation is stopped completely
25 by the administration of potassium chloride..." See Affidavit of Mark Dershwitz dated
26 September 27, 2004, at p. 9, *Perkins v. Polk, et. al*, No. 5:04-CT-643-BO, attached hereto as
27 Exhibit 7. While I agree with Dr. Dershwitz that the successful delivery into the circulation
28

1 of large doses of sodium thiopental will slow the circulation, slowing of the circulation is a
2 common consequence of the induction of general anesthesia and does not cause death. I also
3 agree with Dr. Dershwitz that EKG and execution log evidence from executions by lethal
4 injection suggests that circulation is completely stopped by the administration of potassium.
5 For circulation to be completely stopped by potassium, some circulation must be present prior
6 to the administration of potassium. Therefore it is logical and necessary to infer that some or
7 possibly all prisoners are alive until the potassium has been administered and has traveled via
8 the circulation to the heart.
9

10 C) Properties of Sodium Thiopental and Pancuronium. Sodium thiopental and
11 pancuronium exert their effects by interacting with molecular targets in the nervous system
12 and on muscle cells in a manner that induces unconsciousness and stops breathing. Sodium
13 thiopental and pancuronium, unlike other chemicals such as cyanide, do not kill cells or
14 tissues, and are useful to clinicians precisely because they do not kill or harm cells or tissues.
15 The reason that sodium thiopental and pancuronium can cause death is that they cause the
16 prisoner to stop breathing. Failure to breathe will result in brain damage, brain death, and
17 cardiac arrest as the level of oxygen in the blood declines over time. These processes take a
18 varying amount of time, depending on many factors. Physicians generally use four minutes
19 of not breathing as the approximate benchmark time after which irreversible brain damage
20 from lack of oxygen occurs, and death typically occurs some number of minutes after the
21 onset of brain damage. It is worth noting, however, that this general figure of four minutes is
22 often used in the context of cardiac arrest, in which there is no circulation of blood through
23 the brain. If some level of blood circulation persists, it is very likely that brain damage and
24 brain death would take longer than four minutes.
25

26 In the context of lethal injection, sodium thiopental and pancuronium, if successfully
27 delivered into the circulation in large doses, would indeed each be lethal, because they would stop the
28

1 inmate's breathing. However, as described above, in execution by lethal injection as practiced by
2 California and other states the administration of potassium and death precede any cardiac arrest that
3 would be caused by sodium thiopental and pancuronium.

4 11. Intravenous injection of concentrated potassium chloride solution causes excruciating
5 pain. The vessel walls of veins are richly supplied with sensory nerve fibers that are highly sensitive
6 to potassium ions. The intravenous administration of concentrated potassium in doses intended to
7 cause death therefore would be extraordinarily painful. Defendants' selection of potassium chloride
8 to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain
9 prior to execution. There exist, however, alternative chemicals that do not activate the nerves in the
10 vessel walls of the veins in the way that potassium chloride does. Despite the fact that the statute
11 authorizing lethal injection in California does not specify or require the use of potassium, *see* Cal.
12 Penal Code §3604(a), defendants have failed to choose a chemical that would cause death in a
13 painless manner.
14

15 12. Thus, the CDC has exercised its statutory discretion to select the means of causing
16 death by choosing a medication (potassium chloride) that causes extreme pain upon administration,
17 instead of selecting available, equally effective yet essentially painless medications for stopping the
18 heart. In so doing, the CDC has taken on the responsibility of ensuring, through all reasonable and
19 feasible steps, that the prisoner is sufficiently anesthetized and cannot experience the pain of
20 potassium chloride injection.
21

22 13. The provision of anesthesia has become a mandatory standard of care whenever a
23 patient is to be subjected to a painful procedure. Throughout the civilized world, the United States,
24 and California, whenever a patient is required to undergo a painful procedure, it is the standard of
25 care to provide some form of anesthesia. Circumstances arise in which prisoners in California
26 require surgery, and in many instances the surgery requires the provision of general anesthesia. In
27 these circumstances general anesthesia is provided, and it is provided by an individual with specific
28

1 training and qualifications in the field of anesthesiology. It is critical to understand that the great
2 majority of physicians and nurses and other health care professionals do not possess the requisite
3 training, skills, experience, and credentials to provide general anesthesia. It would be unconscionable
4 to forcibly subject any person, including a prisoner in California, to a planned and anticipated highly
5 painful procedure without first providing an appropriate anesthetic, and it would be unconscionable
6 to allow personnel who are not properly trained in the field of anesthesiology to attempt to provide or
7 supervise this anesthetic care.

8
9 14. As a living person who is about to be subjected to the excruciating pain of potassium
10 injection, it is imperative that all prisoners undergoing lethal injection be provided with adequate
11 anesthesia. This imperative is of the same order as the imperative to provide adequate anesthesia for
12 any California prisoner requiring general anesthesia (or any type of anesthesia) before undergoing
13 painful surgery. Given that the injection of potassium is a scheduled and premeditated event that is
14 known without any doubt to be extraordinarily painful, it would be unconscionable and barbaric for
15 potassium injection to take place without the provision of sufficient general anesthesia to ensure that
16 the prisoner is rendered and maintained unconscious throughout the procedure, and it would be
17 unconscionable to allow personnel who are not properly trained in the field of anesthesiology to
18 attempt to provide or supervise this anesthetic care.

19
20 **B. Failure to Adhere to a Medical Standard of Care in Administering Anesthesia**

21 15. It is my opinion to a reasonable degree of medical certainty that the lethal injection
22 procedures selected for use in California and used elsewhere subject the prisoner to an increased and
23 unnecessary risk of experiencing excruciating pain in the course of execution. Because of the
24 potential for an excruciating death created by the use of potassium chloride, it is necessary to induce
25 and maintain an appropriate and deep plane of anesthesia. The circumstances and environment under
26 which anesthesia is to be induced and maintained according to Procedure No. 770 create, needlessly,
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1 a significant risk that inmates will suffer the pain that accompanies the injection of potassium
2 chloride.

3 16. Presumably because of the excruciating pain evoked by potassium, lethal injection
4 protocols like Procedure No. 770 plan for the provision of general anesthesia by the inclusion of
5 sodium thiopental. When successfully delivered into the circulation in sufficient quantities, sodium
6 thiopental causes sufficient depression of the nervous system to permit excruciatingly painful
7 procedures to be performed without causing discomfort or distress. Failure to successfully deliver
8 into the circulation a sufficient dose of sodium thiopental would result in a failure to achieve
9 adequate anesthetic depth and thus failure to block the excruciating pain of potassium administration.
10

11 16. Defendants' procedures do not comply with the medical standard of care for inducing
12 and maintaining anesthesia prior to and during a painful procedure. Likewise, Defendants'
13 procedures are not compliant with the guidelines set forth by the American Veterinary Medical
14 Association for the euthanasia of animals. Further, Defendants have made insufficient preparation
15 for the real possibility, encountered in many other jurisdictions, and planned for in those
16 jurisdictions, that peripheral IV access cannot be successfully established.
17

18 **1. The Dangers of Using Sodium Thiopental as an Anesthetic**

19 17. A major concern I have based on what I know about CDC's lethal injection protocol
20 relates to the use of sodium thiopental. Sodium thiopental is an ultrashort-acting barbiturate with a
21 relatively short shelf life in liquid form. Sodium thiopental is distributed in powder form to increase
22 its shelf life; it must be mixed into a liquid solution by trained personnel before it can be injected.

23 18. When anesthesiologists use sodium thiopental, we do so for the purposes of
24 temporarily anesthetizing patients for sufficient time to intubate the trachea and institute mechanical
25 support of ventilation and respiration. Once this has been achieved, additional drugs are
26 administered to maintain a "surgical depth" or "surgical plane" of anesthesia (i.e., a level of
27 anesthesia deep enough to ensure that a surgical patient feels no pain and is unconscious). The
28

1 medical utility of sodium thiopental derives from its ultrashort-acting properties: if unanticipated
2 obstacles hinder or prevent successful intubation, patients will likely quickly regain consciousness
3 and resume ventilation and respiration on their own.

4 19. The benefits of sodium thiopental in the operating room engender serious risks in the
5 execution chamber. Based on the information I have available to me concerning CDC's execution
6 protocol, the five gram dose of sodium thiopental is apparently administered in a single injection
7 from a single syringe. Although the full five grams of sodium thiopental, if properly administered
8 into the prisoner's bloodstream, would be more than sufficient to cause unconsciousness and,
9 eventually, death, if no resuscitation efforts were made, my research into executions by lethal
10 injection strongly indicates that executions have occurred where the full dose of sodium thiopental
11 was not fully and properly administered. If an inmate does not receive the full dose of sodium
12 thiopental because of errors or problems in administering the drug, the inmate might not be rendered
13 unconscious and unable to feel pain, or alternatively might, because of the short-acting nature of
14 sodium thiopental, regain consciousness during the execution.

15 20. Thus, the concerns raised in this affidavit apply regardless of the size of the dose of
16 sodium thiopental that is prescribed under the protocol. The level of anesthesia, if any, achieved in
17 each individual inmate depends on the amount that is successfully administered, although other
18 factors such as the inmate's weight and sensitivity/resistance to barbiturates are also important.
19 Many foreseeable situations exist in which human or technical errors could result in the failure to
20 successfully administer the intended dose. Procedure No. 770 both fosters these potential problems
21 and fails to provide adequate instruction for preventing or rectifying these situations, and it does
22 these things needlessly and without legitimate reason. Examples of problems that could prevent
23 proper administration of sodium thiopental include, but are not limited to, the following:

- 24 a) Errors in Preparation. Sodium thiopental is delivered in powdered form and
25 must be mixed into an aqueous solution prior to administration. This preparation requires the
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1 correct application of pharmaceutical knowledge and familiarity with terminology and
2 abbreviations. Calculations are also required, particularly if the protocol requires the use of a
3 concentration of drug that differs from that which is normally used.

4 b) Error in Labeling of Syringes. Procedure No. 770 requires that the syringes of
5 chemicals be prepared in reverse order, so that the potassium chloride syringe are loaded first
6 and are labeled "3." Then the pancuronium bromide syringes are created and labeled "2," and
7 finally the sodium thiopental syringes are prepared and are labeled "1." Confusion in creating
8 the syringes could lead to mislabeling, and because the syringes are labeled only with
9 numbers, such a mistake could not be detected and corrected later in the process. Use of
10 numbers or other codes instead of drug names is unacceptable medical practice, and the
11 inclusion of such coding in CDC's lethal injection protocol bespeaks a lack of regard for basic
12 tenets of medical practice and safety.

13 c) Error in Selecting the Correct Syringe during the sequence of administration.

14 d) Error in Correctly Injecting the Drug into the Intravenous Line. The "three-
15 way stopcock" used in the California execution protocol as one of the two alternate methods
16 for delivering the drugs may be turned in the wrong direction, resulting in a retrograde
17 injection of the drug into the IV fluid bag rather than into the inmate. The design of three-
18 way stopcocks is counterintuitive to many individuals, and the error of retrograde injection is
19 widespread in clinical practice. Even seasoned professionals are known to make this error,
20 and the probability of this error occurring is greatly increased in the hands of inexperienced
21 practitioners.

22 e) The IV Tubing May Leak. An "IV setup" consists of multiple components
23 that are assembled by hand prior to use. If, as dictated by Procedure No. 770, the personnel
24 who are injecting the drugs are not at the bedside but are instead in a different room or part of
25 the room, multiple IV extension sets need to be inserted between the inmate and the
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1 administration site. Any of these connections may loosen and leak. In clinical practice, it is
2 important to maintain visual surveillance of the full extent of IV tubing so that such leaks may
3 be detected. The configuration of the death chamber and the relative positions of the
4 executioners and the inmate may hinder or preclude such surveillance, thereby causing a
5 failure to detect a leak.

6 f) Incorrect Insertion of the Catheter. If the catheter is not properly placed in a
7 vein, the sodium thiopental will enter the tissue surrounding the vein but will not be delivered
8 to the central nervous system and will not render the inmate unconscious. This condition,
9 known as infiltration, occurs with regularity in the clinical setting. Recognition of infiltration
10 requires continued surveillance of the IV site during the injection, and that surveillance
11 should be performed by the individual who is performing the injection so as to permit
12 correlation between visual observation and tactile feedback from the plunger of the syringe.

13 g) Migration of the Catheter. Even if properly inserted, the catheter tip may
14 move or migrate, so that at the time of injection it is not within the vein. This would result in
15 infiltration, and therefore a failure to deliver the drug to the inmate's circulation and failure to
16 render the inmate unconscious.

17 h) Perforation or Rupture or Leakage of the Vein. During the insertion of the
18 catheter, the wall of the vein can be perforated or weakened, so that during the injection some
19 or all of the drug leaves the vein and enters the surrounding tissue. The likelihood of rupture
20 occurring is increased if too much pressure is applied to the plunger of the syringe during
21 injection, because a high pressure injection results in a high velocity jet of drug in the vein
22 that can penetrate or tear the vessel wall.

23 i) Excessive Pressure on the Syringe Plunger. Even without damage or
24 perforation of the vein during insertion of the catheter, excessive pressure on the syringe
25 plunger during injection can result in tearing, rupture, and leakage of the vein due to the high
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1 velocity jet that exits the tip of the catheter. Should this occur, the drug would not enter the
2 circulation and would therefore fail to render the inmate unconscious.

3 j) Securing the Catheter. After insertion, catheters must be properly secured by
4 the use of tape, adhesive material, or suture. Movement by the inmate, even if restrained by
5 straps, or traction on the IV tubing may result in the dislodging of the catheter. If this were to
6 occur under a sheet, it would not be detected, and the drug would not enter the inmate's
7 circulation and would not render the inmate unconscious.

8 k) Failure to Properly Administer Flush Solutions Between Injections of Drugs.
9 Solutions of paralytic agents such as pancuronium cause sodium thiopental to precipitate out
10 of solution on contact, thereby interfering with the delivery of the drug to the inmate and to
11 the central nervous system.

12 l) Failure to Properly Loosen or Remove the Tourniquet from the Arm or Leg
13 after placement of the IV catheter will delay or inhibit the delivery of the drugs by the
14 circulation to the central nervous system. This may cause a failure of the sodium thiopental to
15 render and maintain the inmate in a state of unconsciousness.

16 m) Impaired Delivery Due to Restraining Straps. Restraining straps may act as
17 tourniquets and thereby impede or inhibit the delivery of drugs by the circulation to the
18 central nervous system. This may cause a failure of the sodium thiopental to render and
19 maintain the inmate in a state of unconsciousness. Even if the IV is checked for "free flow"
20 of the intravenous fluid prior to commencing injection, a small movement within the
21 restraints on the part of the inmate could compress the vein and result in impaired delivery of
22 the drug.

23 **2. The Need for Adequate Training in Administering Anesthesia**

24 21. Because of these foreseeable problems in administering anesthesia, in California and
25 elsewhere in the United States, the provision of anesthetic care is performed only by personnel with
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1 advanced training in the medical subspecialty of Anesthesiology. This is because the administration
2 of anesthetic care is complex and risky, and can only be safely performed by individuals who have
3 completed the extensive requisite training to permit them to provide anesthesia services. Failure to
4 properly administer a general anesthetic not only creates a high risk of medical complications
5 including death and brain damage, but also is recognized to engender the risk of inadequate
6 anesthesia, resulting in the awakening of patients during surgery, a dreaded complication known as
7 "intraoperative awareness." The risks of intraoperative awareness are so grave that, in October 2005,
8 the American Society of Anesthesiologists published a new practice advisory on the subject of
9 intraoperative awareness. If the individual providing anesthesia care is inadequately trained or
10 experienced, the risk of these complications is enormously increased. In California and elsewhere in
11 the United States general anesthesia is administered by physicians who have completed residency
12 training in the specialty of Anesthesiology, and by nurses who have undergone the requisite training
13 to become Certified Registered Nurse Anesthetists (CRNAs). Physicians and nurses who have not
14 completed the requisite training to become anesthesiologists or CRNAs are not permitted to provide
15 general anesthesia.
16

17 22. In my opinion, individuals providing general anesthesia in the San Quentin State
18 Prison should not be held to a different or lower standard than is set forth for individuals providing
19 general anesthesia in any other setting in California. Specifically, the individuals providing general
20 anesthesia within San Quentin prison should possess the experience and proficiency of
21 anesthesiologists and/or CRNAs. Conversely, a physician who is not an anesthesiologist or a nurse
22 who is not a CRNA should not be permitted to provide general anesthesia within San Quentin prison
23 (or anywhere else in California).
24

25 23. CDC's execution protocol fails to specify whether the injection team has any training
26 in administering anesthesia, or, if personnel are given training, what that training might be. See
27 Procedure No. 770 at 39 ("The angiocath shall be inserted into a usable vein by a person qualified,
28

1 trained, or otherwise authorized by law to initiate such a procedure.”). The absence of any details as
2 to the training, certification, or qualifications of injection personnel raises critical questions about the
3 degree to which condemned inmates risk suffering excruciating pain during the lethal injection
4 procedure. The great majority of nurses are not trained in the use of ultrashort-acting barbiturates;
5 indeed, this class of drugs is essentially only used by a very select group of nurses who have obtained
6 significant experience in intensive care units and as nurse anesthetists. Very few paramedics are
7 trained or experienced in the use of ultrashort-acting barbiturates. Based on my medical training and
8 experience, and based upon my research of lethal injection procedures and practices, inadequacies in
9 these areas elevate the risk that the lethal injection procedure will cause the condemned to suffer
10 excruciating pain during the execution process. Failure to require that the injection team have
11 training equivalent to that of an anesthesiologist or a CRNA compounds the risk that inmates will
12 suffer excruciating pain during their executions.

14 **3. Procedure No. 770’s Failure to Account for Foreseeable Problems in Anesthesia**
15 **Administration**

16 24. In addition to lacking any policy on the training necessary to perform a lethal
17 injection, Procedure No. 770 imposes conditions that exacerbate the foreseeable risks of improper
18 anesthesia administration described above, and fails to provide any procedures for dealing with these
19 risks. Perhaps most disturbingly, Procedure No. 770 prevents any type of effective monitoring of the
20 inmate’s condition or whether he is anesthetized and unconscious. After the IV lines are inserted into
21 the inmate but before the administration of the sodium thiopental, the execution chamber is closed
22 and the prisoner is left alone in the chamber for the duration of the execution. Procedure No. 770
23 dictates that all prison personnel will be in a separate room, separated from the execution chamber by
24 a window. Accepted medical practice, however, would dictate that trained personnel monitor the IV
25 lines and the flow of anesthesia into the veins through visual and tactile observation and examination.
26 The lack of any qualified personnel present in the chamber during the execution thwarts the
27 execution personnel from taking the standard and necessary measures to reasonably ensure that the
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